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LEGISLATIVE RETROACTIVITY

JAN G. LAITOS*

Whenever a new law affects either past legal relationships or decisions made by private parties in reliance on prior law, the question of prospective or retroactive application of the new law becomes significant. If the new law is to apply retroactively, it may affect previously-established rights or legal relationships. The new retroactive law may alter pre-existing legal arrangements beginning with the effective date of the new law, or it may relate back to the original date of creation of legal relationships arising under prior law. Retroactive application of a new law may also attach legal consequences to decisions made by private parties who did not anticipate these consequences at the time the decision was made. These new legal consequences may take effect on the date of the new law, or they may apply backwards to the time of the original decision. Such retroactivity can profoundly affect the plans and expectations of private parties.

The United States Supreme Court has been aware of, and sensitive to, the significance of retroactivity. Between 1988 and 1997, the Court has considered virtually all of the paradigmatic retroactivity issues involving legislatures,¹ courts,² and administrative agencies.³

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1. In 1994, the Court decided that statutes should have presumptively prospective effect in the absence of legislative guidance to the contrary. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-73 (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). *Landgraf* concluded that this presumption against statutory retroactivity exists even when the conduct preceding the new statute has resulted in a judicial case "pending" on appeal on the effective

date of the new statute. See *Landgraf*, 511 U.S. at 263-65.

The *Landgraf* presumption is limited to statutes altering substantive rights. See *id.* at 271-73. It does not apply to changes characterized as procedural, see *id.* at 275, jurisdictional, see *id.* at 274, or remedial. See *id.* at 285 n.37. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997), the Court clarified that jurisdictional statutes address which courts shall have jurisdiction to hear a cause of action, while non-jurisdictional statutes determine whether a suit may be brought at all.

Other Supreme Court decisions have considered the extent to which Congress may retroactively alter the results reached in a litigation context. In *Plaut v. Spendthrift Farm, Inc.*, the Court found a separation of powers impediment to congressional attempts to reopen final court judgments. 115 S. Ct. 1447 (1995). *Plaut* addressed a different kind of retroactivity than that at issue in *Landgraf*. *Landgraf* presumed prospectivity to avoid construing a new law that otherwise might have attached new [post-enactment] legal consequences "to events completed" before the law's enactment. *Landgraf*, 511 U.S. at 258-59. This means that the statute in *Landgraf* altered the legal consequences of past private actions only in the future. *Plaut* considered a statute which altered the past legal consequences of past private actions. The Court in *Plaut* erected a barrier to retroactive legislation that "prescribes what the law was at an earlier time." *Plaut*, 115 S. Ct. at 1456.

In the context of tax legislation, however, Congress may prescribe what the law was at an earlier time if it so intends. In *United States v. Carlton*, the Court decided that due process was not violated by an amendment to a federal tax statute that imposed a retroactive tax liability on pre-amendment transactions. 512 U.S. 26 (1994).

The Supreme Court recently resolved important issues about the relationship between new legislation and rules announced previous judicial decisions. Both *Plaut* and *Rivers* permit Congress to alter rules of law established by judicial decision (i.e., to "legislatively overrule" a case), even decisions by the Supreme Court. See *Plaut*, 115 S. Ct. at 1457; *Rivers*, 511 U.S. at 304-05 & n.5. *Plaut* also established that Congress may decide to announce a new law that operates retroactively to govern the rights of parties whose rights would otherwise be subject to a rule announced in an appealable judicial decision. See *Plaut*, 115 S. Ct. at 1457 (acknowledging "the distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed)"). If Congress wishes to change the law for pending cases that are not yet final, it must make clear its intent. See *Landgraf*, 511 U.S. at 270-73. Once Congress has signaled its intent, it may change the result of a pending case by changing the law underlying the legal basis of the pending suits. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992).

In 1993 the Court was presented with the question of whether a legislative body may change the statutory language underlying a governmental contract, thereby retroactively changing the contract itself. See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993). The Court left unresolved this significant retroactivity issue when it interpreted the contract as not prohibiting the changes contemplated by the subsequent statute. See *id.* at 17-21. However, in 1996 the Court concluded that the government may be liable for damages resulting from retroactive contract breaches where the contract allocates the risk of regulatory change to the government. See *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996).

2. In 1993 the Court considered whether there should be a different rule for retroactivity when a court case is changed not by the legislature, but by a subsequent court case. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). The Court concluded that when a court in a civil context reverses judicial precedent and applies a new rule of federal law to the parties

These cases indicate that the Court has revised its thinking about the nature and legal effect of retroactivity, particularly legislative retroactivity. Lower court cases also seem to confirm that judicial review of retroactive lawmaking has undergone a change in recent years.⁴ This developing body of law from the Supreme Court and lower courts has, in the past decade, basically reconstructed the jurisprudence of retroactivity.

Surprisingly, other than a few important (and frequently cited) articles written years ago,⁵ retroactive legislation has not been the focus of much commentary.⁶ Rather, current scholarship has tended

before it, that new rule is to be retroactively applied to private conduct arising before the new rule, and to all cases pending that are not yet final. *See id.* at 97. Accordingly, prospectivity is assumed with respect to new legislation, while retroactivity is acceptable for new judicial rules.

When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See* *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). A state is also free to provide an exclusively predeprivation remedy for when a statute is alleged to be unconstitutional. *See* *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38 & n.21 (1990) (assessing challenges to taxes). However, if a state holds out a "clear and certain" postdeprivation remedy, it cannot later declare that no such remedy exists after the statute to which the remedy applies is declared unconstitutional. *See* *Reich v. Collins*, 115 S. Ct. 547, 550 (1994). In 1995 the Court concluded that the *Harper* retroactivity rule for new judge-made rules does *not* give state courts sufficient legal leeway to create exceptions from the application of the new rule based on reasonable reliance interests in the former state law. *See* *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745 (1995).

3. In 1988 the Court presaged the *Landgraf* prospectivity rule when it decided a case that concerned the retroactivity of rules from administrative agencies. *See* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). *Bowen* established that (1) federal administrative rules may have legal consequences only for the future, and (2) a statutory grant of legislative rulemaking authority will not encompass the power to promulgate retroactive rules unless the legislature expressly conveys that power. *See id.* at 208-09.

4. *See infra* Part V.

5. *See, e.g.*, Michael J. Gaetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820 (1985); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1960); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Bryant Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409 (1928); Edward S. Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1939).

6. A text that is still required reading on the general subject of retroactivity is LON L. FULLER, *THE MORALITY OF LAW* (1964). An excellent historical account of the Court's approach to retroactive legislation can be found in James L. Kainen, *The Historical Framework*

to discuss retroactivity in a judicial,⁷ criminal,⁸ or administrative⁹ context. This Article reconsiders, in light of recent judicial developments, the problem of retroactivity, and proposes a new way of thinking about nonpenal legislative retroactivity.

Part I suggests that legislation should be classified according to how it alters the temporal legal consequences of past and present private actions. Use of this proposed classification system reveals that the most common type of retroactive legislation operates with what will be termed "secondary retroactivity," which is where the legal consequences of past private actions are altered only in the future. Part II considers the traditional doctrinal justifications for laws that apply with secondary retroactivity. Part II concludes that, although secondary retroactivity permits legislatures to achieve certain political goals, it produces so many social and economic costs that its validity should be suspect.¹⁰

Parts III through V argue that the negative consequences of retroactive lawmaking should encourage, and in fact have caused,

for Reviving Constitutional Protection for Property and Contract Rights, 79 CORNELL L. REV. 87 (1993); see also Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997) (attempting to harmonize concerns of efficiency and fairness regarding retroactivity analysis).

7. See, e.g., Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991); Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'Y 595 (1992); William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902 (1993).

8. See, e.g., Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996); L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11.

9. See, e.g., Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261 (1992); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106.

10. See FULLER, *supra* note 6, at 53 ("Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly a monstrosity."); Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1071-75 (1993) (stating that retroactive legislation should be subject to more meaningful judicial review because of "the inherent injustice of retroactive laws").

reviewing courts to empower private parties with three defenses to defeat retroactively-applying legislation.

Part III shows that while laws intended to apply with secondary retroactivity are usually valid, those that operate with what will be termed “primary retroactivity”—laws that alter the past legal consequences of past private actions—are usually invalid.¹¹ Part IV analyzes the 1994 Supreme Court decision in *Landgraf v. USI Film Products*.¹² The *Landgraf* case illustrates how the Court has become far more sympathetic to parties burdened by legislation that applies with secondary retroactivity. In *Landgraf*, the Court returns to an expansive definition of retroactivity, which is broad enough to encompass the idea of secondary retroactivity.¹³ *Landgraf* holds that legislative changes that may be characterized as retroactive under the *Landgraf* definition, must be subject to a presumption of prospectivity. This presumption prevents the operation of legislation that might otherwise burden existing substantive rights with secondary retroactivity. The presumption is not rebutted unless the legislative body expresses its intent to apply the new law with secondary retroactivity.¹⁴

Part V advances a theory for invalidating secondarily retroactive laws that articulate a legislative intent which rebuts the *Landgraf* presumption of prospectivity. Part V argues that such intentional secondary retroactivity is forbidden when pre-enactment conduct has attained “protected legal status” with respect to the new, retroactively-applying rule. Pre-enactment private conduct has “protected legal status” when various constitutional provisions¹⁵ and

11. See *Plaut*, 115 S. Ct. at 1456 (stating that legislation which alters what the law was at an earlier, pre-enactment time, is invalid).

12. 511 U.S. 244 (1994). See also *supra* note 1.

13. The *Landgraf* opinion expands the definition of retroactivity to include changes in the law which attach “new legal consequences to events completed before its enactment.” *Id.* at 269-70. A more narrow definition would have limited the *Landgraf* rule only to statutes that take effect from a time anterior to their passage. After *Landgraf*, a law which in the future disrupts certain settled expectations, imposes new obligations, or increases liability for past actions, is retroactive because the law attaches new legal consequences to prior acts. See *id.*

14. See *id.* at 270.

15. *Landgraf* recognizes “that the antiretroactivity principle finds expression in several provisions of our Constitution.” *Id.* at 266. The most prominent of these provisions are the

equitable principles,¹⁶ which track a formula articulated in the *Landgraf* opinion,¹⁷ operate to immunize the conduct from secondary retroactivity.

I. CLASSIFYING THE TEMPORAL APPLICATION OF LEGISLATION

A. *How Does A New Law Apply? A Proposed Classification Scheme*

Legislative rules may be adopted by federal, state, and local legislative and administrative bodies. When these entities enact or adopt legislation, the new rule may apply to private parties in one of three ways. If the legislation is purely prospective, then its provisions affect private behavior and events occurring only after the applicable effective dates of the legislation. Laws that are prospective alter the future (post-enactment) legal consequences of private action. Where legislation burdens substantive rights held by private parties prior to its enactment, and is ambiguous or silent as to its effective date, it is presumed to be prospective.¹⁸

If the new law attaches new legal consequences to events completed before its enactment, it operates retroactively. Laws that apply retroactively may be classified as operating with either

Takings and Due Process clauses, U.S. CONST. amends. V & XIV (protecting private property), and the Contracts Clause, U.S. CONST. art. I, § 10, ch. 1 (protecting contract rights). *See, e.g.,* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (holding that the Contracts Clause prevents retroactive alteration of contract with state bondholders); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 584-90 (1935) (holding that the Takings Clause invalidates a bankruptcy law that retroactively abrogates a vested property interest).

16. *Landgraf* acknowledges that arguments against retroactivity may also be based upon "[e]lementary consideration of fairness" found outside the Constitution. 511 U.S. at 265. For example, *Landgraf* seems to resurrect the vested rights doctrine as a bar to secondary retroactivity. *See id.* at 290-93 (Scalia, J., concurring) (criticizing the majority's "vested rights" approach to retroactivity). In addition, the equitable estoppel doctrine protects private property owners from retroactive changes in the law if the owner has relied, in good faith, upon some act or omission of government, and if there has been a substantial change in position by the owner as a result of this reliance. *See* CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 13 (1982).

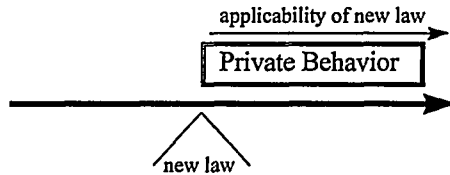
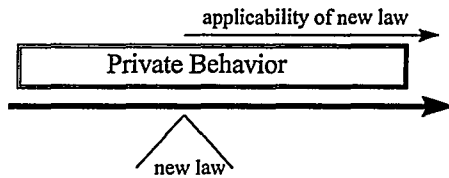
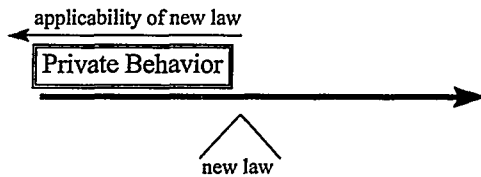
17. The *Landgraf* opinion suggests that the validity of retroactive legislation may depend on the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270.

18. *See id.* at 269-73.

secondary or primary retroactivity. Secondary retroactivity occurs far more frequently than primary retroactivity. A law that operates with secondary retroactivity affects the legality of past private action in the future, after the applicable date of the law.¹⁹ Primary retroactivity alters the legal consequences of past private action.²⁰ Action that was legally permissible at the time it occurred, is either made impermissible, or is burdened, in the past (i.e., prior to the applicable date of the new law). These three possibilities are diagrammed in Figure 1.

19. See generally *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring); John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 58-60 (1967).

20. See *supra* note 19.

FIGURE 1**PROSPECTIVITY:****SECONDARY RETROACTIVITY:****PRIMARY RETROACTIVITY:***B. When Does Retroactivity Invalidate Legislation?*

New legislation can apply prospectively, or with primary or secondary retroactivity. This classification scheme does not reveal whether, and when, the fact of retroactivity invalidates the law. Nor does it establish whether a legislative body may validate retroactive laws simply by expressing an intent that the new law apply with

either primary or secondary retroactivity. The following list summarizes possible rules regarding the relationship between legislative intent and the ultimate validity of retroactive legislation:

- (1) All retroactive laws, regardless of whether the law applies with primary or secondary retroactivity, are valid so long as the legislature intends for the law to be retroactive.
- (2) All retroactive laws are invalid, regardless of legislative intent.
- (3) Laws that operate with primary retroactivity are invalid, regardless of legislative intent. However, laws intended by the legislature to operate with secondary retroactivity are valid.

In two significant opinions involving primary and secondary retroactivity, the Supreme Court seems to have rejected all three of the above possibilities. The Court instead has adopted a more flexible rule.

In 1995, in *Plaut v. Spendthrift Farm, Inc.*, the Court addressed the question of whether a federal statute could require federal courts to reopen federal judgments in private civil actions.²¹ It concluded that such a law violates constitutional separation of power principles.²² The Court also suggested that “retroactive legislation that requires its own application in a case already finally adjudicated” is invalidly retroactive.²³ The statute operated with primary retroactivity because it altered the legal consequences of past action. The Court in *Plaut* confirms the traditional view that primary retroactivity is usually invalid, regardless of legislative intent.²⁴

21. See *Plaut*, 115 S. Ct. 1447 (1995). In *Plaut*, a Securities Exchange Act section provided for reinstatement of actions that had been dismissed as time barred after the court established a uniform limitations period if they would have been timely under the previously existing laws.

22. See *id.* at 1463.

23. *Id.* at 1456, 1460 (stating that statutes are impermissibly retroactive which subject “a judgment . . . to a reopening requirement which did not exist when the judgment was pronounced”). See also *supra* note 1.

24. See *infra* Part III.C.

In 1994, in *Landgraf*, the Court addressed the more frequently-occurring issue of secondarily retroactive legislation.²⁵ The *Landgraf* Court considered the question of whether a federal statute, the Civil Rights Act of 1991, could apply with secondary retroactivity.²⁶ *Landgraf* concluded that if legislation was secondarily retroactive (i.e., it attached new legal consequences to events completed before its enactment), then its retroactive nature would not, by itself, invalidate the new law.²⁷ The Court noted two important requirements for the validity of retroactive legislation. First, the legislative body must have unambiguously expressed its intent for the law to be secondarily retroactive.²⁸ Without clear legislative intent, a law is presumed to apply prospectively only.²⁹ Second, even if the legislature clearly expresses its intent that the law apply with secondary retroactivity, the law may still be invalidated if it violates one of the “antiretroactivity principle[s that] find expression in several provisions of our Constitution.”³⁰ These “antiretroactivity principles” may be used by private parties whose pre-enactment conduct provides them with *protected legal status* from application of the new law. The elements of protected legal status, discussed more fully in Part V, are as follows: (1) the new law must be intended to alter future legal consequences of past private action (i.e., it must be intentionally secondarily retroactive); (2) the past private action must

25. See *supra* note 1.

26. The Civil Rights Act of 1991 creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. See Pub. L. 102-166, § 102, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a(a)).

In 1989 the plaintiff in *Landgraf* brought suit against her employer for allegedly violating Title VII of the Civil Rights Act of 1964. See *Landgraf*, 511 U.S. at 248. Her complaint was dismissed because she was not entitled to the equitable relief permitted by Title VII, which at that time did not authorize the recovery of damages. See *id.* at 249. While her appeal was pending, the 1991 Act permitting the recovery of damages was signed into law. See *id.* The question before the Supreme Court in *Landgraf* was whether the compensatory and punitive damage provision of § 102 of the 1991 Act should apply, post-enactment, to conduct that occurred before the effective date of the 1991 Act. See *id.* at 250.

27. See *id.* at 267-70.

28. See *Landgraf*, 511 U.S. at 270 (citing *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806)).

29. See *id.* at 280.

30. See *id.* at 266.

have some *legal status*—it must have resulted in the creation of a property interest, contract, or some other vested right; and (3) that legal status must also be protected by some antiretroactivity principle, found either in the Constitution³¹ or in equity.³²

The following guidelines thus determine whether legislation is impermissibly retroactive:

- Laws which the legislature intends to apply with primary retroactivity are usually invalid.
- Laws which the legislature intends to apply with secondary retroactivity are usually valid as long as the legislature rebuts the presumption of prospectivity with an unambiguous statement of legislative intent.
- If the legislature does not rebut the presumption of prospectivity with language that requires secondary retroactivity, the retroactive application is valid unless it affects private actions that have protected legal status.

These general rules provide private parties with several defenses against retroactive legislation. Part II discusses the doctrinal justifications that support successful judicial attacks on retroactively-applying laws.

II. THE CASE AGAINST RETROACTIVE LEGISLATION

A. *Choice of Law Options for Legislative Bodies*

In the most frequently-occurring and straightforward type of retroactivity, a legislative body adopts a substantive rule which alters the future legal consequences of private action taken pursuant to a previously valid legislative rule. This is secondary retroactivity. The new rule may have been adopted to override a previous legislatively-

31. See *id.* See also note 15.

32. See, e.g., *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”).

made rule³³ or to change both an old legislative rule and an agency rule adopted pursuant to the legislation.³⁴ In either situation, private behavior occurring pursuant to an old rule will be affected in the future by the operation of the new rule.

The typical sequence of events for changes in legislative rules and private action is as follows:

- (1) The legislative body adopts a substantive rule (the "old law").
- (2) After its adoption, private conduct occurs consistent with, or perhaps because of, this old law.
- (3) The legislative body adopts a new substantive rule (the "new law").
- (4) After its adoption, the new law in some way affects the legal consequences of the private conduct that occurred under the old law.

For example, assume that in 1960 a Board of County Commissioners imposed a zoning classification on six acres within its jurisdiction. This classification contained a one-half acre minimum lot size requirement. Under the 1960 zoning rule (the "old law"), a maximum of 12 homes could be built on the six acres. In 1997, the Board rezones the six acre parcel so that it is now subject to a two acre minimum lot size requirement. As a consequence of this change in the law (the "new law") only three homes can be built on the six acres.

The applicable legislative body, the Board, has a choice-of-law problem that it must resolve in one of the following ways:

33. See *Landgraf*, 511 U.S. at 250-57 (Civil Rights Act of 1991 changes Title VII of Civil Rights Act of 1964); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990) (Federal Court Improvement Act of 1982 amends the federal statute previously in effect governing awards of post-judgment interest); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 708-10 (1974) (Education Amendments of 1972 change the Civil Rights Act of 1871).

34. See *Bennett v. New Jersey*, 470 U.S. 632 (1985) (Education Amendments of 1978 alter the Elementary and Secondary Education Act of 1965 and administrative regulations in effect in 1972).

(1) The Board can intend that the new law apply prospectively only. In that case, the new two-acre minimum lot size requirement will only apply to events occurring after its 1997 adoption date. A builder who had purchased six acres prior to the effective date of the 1997 law, and had applied for building permits for twelve homes would be subject to the 1960 zoning rule permitting one-half acre minimum lots.³⁵

(2) The Board can fail to reveal its intent about whether the new law should be prospective or retroactive. In this case, the *Landgraf* presumption of prospectivity applies. The presumption will yield the same result as in option (1); the “old” 1960 zoning rule will apply to builders who purchased land and applied for building permits prior to 1997.

(3) The Board can expressly state in the ordinance that the new law operates with primary retroactivity. In that case, the new law applies in the past, supplanting the 1960 old law with the 1997 new law as the operative rule from 1960 to 1997. Events occurring between 1960 and 1997 are made subject to the more restrictive requirements of the new law. A builder who constructed twelve homes prior to 1997 is in violation of the new two acre minimum lot size rule. This builder will likely be able to successfully challenge the 1997 rule.³⁶

(4) The Board can expressly state that the new law operates with secondary retroactivity. In that case, the unambiguous expression of legislative intent rebuts the *Landgraf* presumption of prospectivity. The new law only applies after its 1997 adoption date, but it may affect, after its adoption date, events that occurred prior to 1997. A builder can defeat

35. In some jurisdictions, the filing of an application for a building permit prevents retroactive application of any subsequent law. *See, e.g.,* *Friends of the Law v. King County*, 869 P.2d 1056 (Wash. 1994) (en banc) (stating that land developer’s rights vest at the time of application and the application must be evaluated under the laws in effect at that time); *South Fork Coalition v. Board of Comm’rs of Bonneville County*, 792 P.2d 882, 886 (Idaho 1990) (stating that an applicant’s rights are determined by the law in existence at the time of filing an application for a building permit).

36. *See infra* notes 128-29.

the intentional secondarily retroactive rule only if events occurring prior to 1997 have achieved protected legal status.³⁷

A central thesis of this Article is that when a legislative body, such as the Board of County Commissioners in the above example, contemplates changes in applicable law, the changes generally should operate prospectively. Another proposition this Article advances is that when a legislative body intends that a new law apply retroactively, the scope of protected legal status should be broad enough to provide private parties with meaningful defenses to the retroactivity. Both propositions are grounded in the argument that while retroactivity often serves benign and legitimate purposes, the

37. See *infra* Part V.A.2.

If the builder purchased the six acres between 1960 and 1997 but took no steps toward subdividing or selling the lots, it is unlikely that his past actions in purchasing the land have any protected legal status. Although the application of the new 1997 rule will adversely affect the builder's investment plans if the purpose of the initial purchase was to develop twelve homes, merely burdening the future profitability of the property does not confer protected legal status. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (holding that developers who purchased land with intent to subdivide were subject to a subsequent zoning change limiting development); *Anchorage v. Sandberg*, 861 P.2d 554, 560 (Alaska 1993) (stating that the mere purchase of five lots does not grant purchaser protected legal status immunizing purchaser from the police power); *Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476-78 (6th Cir. 1993) (stating that although a landlord's property has legal status, that status is not protected, in that it does not prevent a locality from retroactively (1) imposing on the landlord the duty in the future to pay the tenant's unpaid water bills, and (2) refusing to provide water service until the delinquent accounts of former tenants are paid).

However, if in addition to purchasing the land, the developer also received some commitment from the relevant government body authorizing the construction of twelve homes, the developer's past actions may have protected legal status. For differing treatments of plat applications, compare *Friends of the Law v. King County*, 869 P.2d 1056, 1060 (Wash. 1994) (en banc) (stating that mere application for approval of plat—even without approval—confers protected legal status), and *Robinson v. Lintz*, 420 P.2d 923, 927 (Ariz. 1966) (lots become legally established and protectable when County properly records plat), with *R. A. Vachon & Son, Inc. v. City of Concord*, 289 A.2d 646, 649 (N.H. 1972) (stating that even final approval of plat does not place lots beyond authority of zoning changes), and *Stucker v. Summit County*, 870 P.2d 283, 288 (Utah Ct. App. 1994) (stating that platting does not confer protected legal status).

For the treatment of building permits, compare *Hy Kom Development Co. v. Manatee County*, 837 F. Supp. 1182, 1187 (M.D. Fla. 1993) (stating that a vested right may be created in a building permit), with *L.M. Everhart Construction, Inc. v. Jefferson County Planning Commission*, 2 F.3d 48, 52 (4th Cir. 1993) (stating that the issuance of building permit does not vest rights against future changes in zoning regulations), and *Littlefield v. Inhabitants of Lyman*, 447 A.2d 1231, 1233 (Me. 1982) (same).

negative aspects are sufficiently disruptive and harmful to justify more extensive judicial limitations of retroactive legislation that are currently employed.

B. The Limited Justifications for Retroactivity

1. Retroactivity for Non-Substantive Changes and for Changes in Judge-Made Law

Non-substantive laws that operate retroactively help to rectify or prevent injustices that may have been caused by the previous law. For example, so-called “curative legislation” will be upheld when the legislation: (1) ratifies prior official conduct of government officers who acted without the requisite authority,³⁸ or (2) retroactively cures defects in an administrative system.³⁹ Retroactive curative rules are acceptable because of the strong public interest in a fair government system, and because they merely produce the same result that would have occurred had the lawmaker (usually an agency) promulgated the original rule correctly.⁴⁰ An amendment which merely “clarifies” existing law may also be applied retroactively.⁴¹

38. This situation usually arises when government officials assert that some duty must be performed—e.g., payment of a duty or tariff—and their authority is later found invalid. *See Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937); *United States v. Heinszen & Co.*, 206 U.S. 370 (1907).

39. *See Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940) (upholding Act of Congress enacted to cure a defect in the administration of a claim under the Longshoremen’s & Harbor Workers’ Compensation Act).

40. *See Delmay v. Paine Webber*, 872 F.2d 356, 358 (11th Cir. 1989) (“[C]ourts have been especially careful to give retrospective application to curative measures.”); *Cromwell v. MacLean*, 25 N.E. 932, 935 (N.Y. 1890) (stating that a statute may be cured if the irregularity or omission could have been corrected by a prior statute); *see also Hochman*, *supra* note 5, at 703-706; *Munzer*, *supra* note 5, at 468-470. *But see Washington Nat’l Arena Ltd. Partnership v. Treasurer*, 410 A.2d 1060, 1069 (Md. 1980) (“The presence of curative language . . . cannot render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional attack merely by the insertion of such language.”).

41. *See GTE Sprint Communications Corp. v. State Bd. of Equalization*, 2 Cal. Rptr. 2d 441, 444-45 (Cal. Ct. App. 1991) (“Where a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved.”); *Tomlinson v. Clarke*, 825 P.2d 706, 713 (Wash. 1992) (en banc) (“When an amendment clarifies existing law and where that amendment does not contravene

When a statute is remedial in nature (i.e., they vary the penalties that may be imposed for violating a statute, or the methods by which, or the time in which, rights of action can be enforced) it may apply retroactively to existing rights of action.⁴² Remedial statutes may be retroactive if a potential plaintiff's ability to enforce substantive rights is left substantially unimpaired.⁴³ Similarly, the Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."⁴⁴ The reasoning behind retroactive application of a new jurisdictional rule is that it usually

previous constructions of the law, the amendment may be deemed curative, remedial, and retroactive.").

42. *Landgraf* left open the question of whether there are constitutional limitations on the retroactive application of punitive damage statutes; the Court instead focused its analysis on the powers of the legislature to upset settled expectations as to what the law requires. See *Landgraf*, 511 U.S. at 265. The Court has indicated that punitive damage awards must comply with due process. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (finding punitive damage award not so "grossly excessive" as to violate due process). Lower courts have concluded that due process permits retroactive imposition of punitive damages if a party has notice that its conduct might be sufficiently "egregious" to support an award of punitive damages under prior law. See *Patton v. TIC United Corp.*, 77 F.3d 1235, 1243-45 (10th Cir. 1996); see also *In re Pacific Far E. Lines, Inc.*, 889 F.2d 242, 246-47 (9th Cir. 1989) (holding that applying a new statute in a pending case which limits fees paid to the Referees' Salary and Expense Fund in bankruptcy required refunding the amounts paid in excess of the limit). But see *Louisiana-Pacific Corp. v. Asarco, Inc.*, 24 F.3d 1565, 1578 (9th Cir. 1994) (declining to extend the reasoning for allowing retroactive application of a public remedial scheme for recovery to an amendment creating a private remedial scheme).

With respect to enforcement, see *Bradley*, 416 U.S. at 710-24 (permitting retroactive application of a statute authorizing an award of attorneys' fees); *Campbell v. Holt*, 115 U.S. 620, 628-29 (1885) (stating that retroactive repeal of a limitations period does not violate due process); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 486-87 (9th Cir. 1991) (permitting retroactive application of a statute of limitations); *Sibley v. United States Dep't of Educ.*, 913 F. Supp. 1181, 1188 (N.D. Ill. 1995) (holding that retroactive appeal of statute of limitations applicable to monetary debts does not violate due process); Slawson, *supra* note 5, at 242 ("Time periods [for statutes of limitations] generally can be lengthened or shortened as the legislature desires, even to the extent of reviving claims previously barred.").

43. See *Gersman v. Group Health Ass'n*, 975 F.2d 886, 898-99 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992) (stating that the *Bradley* presumption of applicability of law as of the time of decision pertains to "remedial provision[s]—not substantive obligations or rights under a statute"); *United States v. Peppertree Apartments*, 942 F.2d 1555, 1561 (11th Cir. 1991) (stating that an intervening statutory amendment authorizing double damages was "remedial" in nature and thus properly applied retroactively).

44. *Landgraf*, 511 U.S. at 274.

does not alter any substantive right, but simply changes the forum that hears the case.⁴⁵

While changes affecting substantive rights should usually be prospective,⁴⁶ a different rule exists when changes affect “procedural” rights.⁴⁷ A new procedural rule, such as one requiring notice and an opportunity for explanation, may be retroactively applied,⁴⁸ unless retroactive application of the procedural change would create a manifest injustice or affect substantive rights.⁴⁹ Unfortunately, the label “substantive” is conclusory, and neither the Supreme Court nor lower courts have been particularly helpful in defining when rights and liabilities affected by statutory changes are substantive. Attempts at defining the scope of the word “substantive” include the following: “vested or mature right[s]”,⁵⁰ “matured property-like interests”,⁵¹

45. See *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F. Supp. 1349, 1357 (N.D. Cal. 1995). However, if a statute “does not merely allocate jurisdiction among fora[, but rather] creates jurisdiction where none previously existed . . . it . . . speaks . . . to the substantive rights of the parties” and is subject to the presumption against retroactivity. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997) (emphasis in original).

46. See, e.g., *United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993) (quoting *Boddie v. American Broad. Co.*, 881 F.2d 267, 270 (6th Cir. 1989)); *Wright v. Director, Fed. Emergency Management Agency*, 913 F.2d 1566, 1574 (11th Cir. 1990) (stating that an intervening regulatory amendment of insurance policy exclusion clause affects unconditional contractual relationship and therefore may not apply retroactively in the absence of legislative intent).

47. *Landgraf*, 511 U.S. at 275 (“Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.”); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969) (stating that a procedural requirement that local housing authorities provide tenants with reasons for eviction which was adopted while case was pending applies to litigants because, among other reasons, it does not infringe on any rights); *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1235-36 (9th Cir. 1995); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 (11th Cir. 1992) (stating that the fact that statutory changes are procedural in nature as opposed to substantive weighs in favor of retroactive application).

48. See *Thorpe*, 393 U.S. 268 (new hearing requirement).

49. See *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 937 (7th Cir. 1992) (stating that because “the retroactive application of a procedural provision [to a case on appeal] could require a new trial and could, therefore, require double expenses [it] would rise to the level of manifest injustice” and apply retroactively); *Raya v. Maryatt Indus.*, 829 F. Supp. 1169, 1174 (N.D. Cal. 1993) (stating that retroactive application of the ADA would result in manifest injustice because it imposes new obligations and affects substantive rights).

50. See *Boyce v. Fleet Fin., Inc.*, 802 F. Supp. 1404, 1408 (E.D. Va. 1992).

when persons are subjected to “greater liabilities”,⁵² and changes which are neither “remedial” nor “procedural.”⁵³

Another instance where retroactivity is appropriate is when courts change judge-made law. When the federal judicial power is exercised to alter or overrule a previous judicial rule, retroactivity conforms to Article III, which confers on the federal courts the power “to say what the law is.”⁵⁴ The common law understood a tradition of retroactivity for judicial decisions.⁵⁵ Blackstone thought retroactivity was an inherent characteristic of judicial power,⁵⁶ and Thomas Cooley believed that the ability to make decisions retroactive was a principal distinction between judicial and legislative power.⁵⁷ Prospective judicial decisionmaking may be criticized for encouraging unprincipled judicial activism, because it permits courts to disregard *stare decisis*.⁵⁸ By 1993, the Supreme Court had established a “firm rule” that new judge-made law announced in a judicial decision will be retroactive.⁵⁹ In addition to these somewhat

51. See *Moze*, 963 F.2d at 936.

52. See *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992).

53. See *Gersman*, 975 F.2d at 899.

54. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

55. See *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965) (“At common law there was no authority for the proposition that judicial decisions made law only for the future.”); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (“Judicial decisions have had retrospective operation for near a thousand years.”).

56. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765) (“[T]he judicial power is [not] delegated to pronounce a new law, but to maintain and expound the old one.”).

57. See THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (1868) (“[I]t is said that that which distinguishes a judicial from a legislative act is, that the one [judicial] is a determination of what the existing law is in relation to some existing thing already done or happened, while the other [legislative] is a predetermination of what the law shall be for the regulation of all future cases . . .”).

58. See *Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring) (stating that refusal to apply new judicial rules to all cases on direct appeal “mitigate[s] the practical force of *stare decisis*”); Cass, *supra* note 7, at 971-973; Robert Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 427-28 (1924).

59. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-79 n. 32 (1994); *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 94-99 (1993). But see *Abbott v. City of Los Angeles*, 326 P.2d 484, 494-495 (Cal. 1958) (stating that where judicial decisions have been relied upon in investing money or purchasing property they should be adhered to based on *stare decisis*).

technical justifications for secondary retroactivity, there are two more general, widely-accepted rationales.

2. The Change-Is-Good Rationale

One rationale advanced to justify secondary retroactivity is that a system of laws which is purely prospective in nature would be too confining and limiting to a lawmaker wishing to improve the status quo. Secondary retroactivity might be needed if the old law has been found to be unworkable,⁶⁰ or if it has produced undesirable effects.⁶¹ Also, if a party harmed by a legislative rule successfully lobbies for its change, secondary retroactivity permits the past interests of that party to be benefited by the change in the future. Retroactivity thus encourages private individuals to press legislators to rethink old notions, and to improve the quality of existing rules. Retroactive lawmaking provides legislators with a potentially valuable tool to attain social and political goals.⁶²

Unfortunately, the change-is-good rationale ignores the fact that retroactive change holds the potential of adversely affecting those who in good faith have reasonably relied on the then extant legal regime. Indeed, it has been said that the hallmark of an *invalid* retroactive law is a law which serves to defeat the reasonable expectations of the person it affects.⁶³ Even if the purpose of retroactive application is to rearrange or nullify the effect of an earlier law to correct inappropriate welfare distributions, the accomplishment of that otherwise benign purpose may harm those who have assumed that current rules will continue. It may be wrong

60. See *Landgraf*, 511 U.S. at 267-68 ("Retroactivity provisions often serve . . . to correct mistakes . . . or simply to give comprehensive effect to a new law Congress considers salutary.").

61. See, e.g., *Certified Color Indus. Comm. v. Secretary of Health, Education, and Welfare*, 283 F.2d 622, 626 (2d Cir. 1960) (stating that the FDA may retroactively revoke its previous certification of certain food additives based on public concerns about the original certification); see also *Munzer*, *supra* note 5, at 471 (discussing the curative aspects of retroactive statutes).

62. See *Krent*, *supra* note 8, at 2156 (stating that retroactivity helps legislatures reach policy objectives).

63. See *Stimson*, *supra* note 5, at 37-38.

to conclude that the benefits resulting from the new distribution will always outweigh the harm experienced by those who relied on a continuation of existing laws.⁶⁴ Moreover, those who lobby for the retroactive change may be far more interested in altering laws to aid a powerful minority, not the larger public interest.⁶⁵ A change-is-good theory cannot fully justify secondary retroactivity.

3. The Unreasonable Expectations Rationale

The other general rationale attacks the argument that retroactivity should be discouraged (or made illegal) because it defeats the "expectations" of private parties. This defense is premised on the notion that private expectations should not be protected from retroactivity when they are unreasonable. Expectations are said to be unreasonable if parties holding the expectation either had a duty to take future changes into account in their decisions, or somehow had notice of the likelihood that there would be a change in the applicable law.⁶⁶ Some commentators have argued "that private parties should anticipate and protect themselves against future changes in government policy, just as they protect themselves from changes in the private market."⁶⁷ When there is constructive notice of change, the expectation-holders are presumed to have assumed the risk that there would be no change. Having taken their chances and lost the bet, there should be no legal recourse when the law does change and applies retroactively in the future to affect an unreasonable

64. See Krent, *supra* note 8, at 2160-67 (discussing the interests implicated by retroactivity in civil and criminal contexts).

65. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intensive Judicial Review?*, 101 YALE L.J. 31 (1991).

66. See *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 646 (1993) ("[The private party] could have had no reasonable expectation that it would not be faced with [future] liability . . ."); see also *Landgraf*, 511 U.S. at 269-70 & n.24 (stating that a statute is not retroactive merely because it upsets expectations based in prior law); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) (finding no taking when expectations under a contract are frustrated, but not appropriated, by lawful government action).

67. Krent, *supra* note 8, at 2164. See generally Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 598-602 (1986) (discussing factoring in potential changes in law that increase liability into initial risk assessments).

expectation.⁶⁸ Moreover, nothing in the Constitution says that reliance on the continuation of existing civil laws is protected.⁶⁹

The “unreasonable expectation” defense of retroactivity is grounded in the belief that when changes are foreseeable, one adversely affected by a change does not have sufficiently clean hands to challenge the validity of the retroactive law. The central problem with this justification for retroactivity is that there is no principled way to put borders on it. Given the constantly changing legal and political process, it is impossible to say that change is ever unanticipated. A logical extension of the unreasonable expectation theory would allow the government to argue that because all persons have actual or constructive knowledge that laws often change, no retroactively-applying law may ever be invalidated for its retroactivity. All persons affected by the retroactivity have always been on notice that the law might change. Therefore, no one should ever have held an expectation based on then-existing laws. Such expectations would be *per se* unreasonable.

Of course, such a result would wreak havoc with America’s economic market system. The market functions because its actors can rely on a set of rules that permit them to make decisions. When this reliance is deemed so unreasonable as to not be worthy of judicial or constitutional protection, then decisions must be made in the absence of predictable rules. Without rules backed by law, there is no

68. See *Concrete Pipe*, 508 U.S. at 644-45 (stating that there is no reasonable basis for employer to expect that the legislative ceiling of liability on its federally regulated pension plan would never be lifted); *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) (“[P]etitioners knew they were taking a risk [in relying on the old law], but they took their chances Having now lost the battle in the [state legislature], petitioners wished to continue the war in court.”); *EEOC v. Puget Sound Log Scaling & Grading Bureau*, 752 F.2d 1389 (9th Cir. 1985) (stating that reliance was unreasonable because prior administrative interpretations had signaled the agency’s future position); *Nicholson v. Brown*, 599 F.2d 639, 648-49 (5th Cir. 1979) (stating that a change of criteria used by agency “are not such a new departure [from previous criteria] that they could not reasonably have been foreseen”).

69. The Ex Post Facto Clause of the Constitution does protect individuals who rely on non-retroactive criminal law. See U.S. CONST. art. I, § 9, cl. 3; see also *United States v. Halper*, 490 U.S. 435 (1989) (determining when a civil sanction constitutes “criminal” punishment); *Bae v. Shalala*, 44 F.3d 489, 492-93 (7th Cir. 1995) (stating that when a civil sanction can be characterized as punishment it implicates *ex post facto* concerns).

foreseeability or accountability. The market would largely cease to work. The unreasonable expectations defense fails to justify unchecked retroactivity.⁷⁰

C. The Problem with Retroactivity

When the legislature intends a law to apply with primary retroactivity, the retroactivity itself usually invalidates the law.⁷¹ When legislation is intended to apply with secondary retroactivity, the *Landgraf* prospectivity rule does not apply and the legislation can safely operate on pre-enactment conduct, unless there is some constitutional or equitable impediment which forbids the retroactive application. What follows here is an examination of why these impediments should be judicially acknowledged.

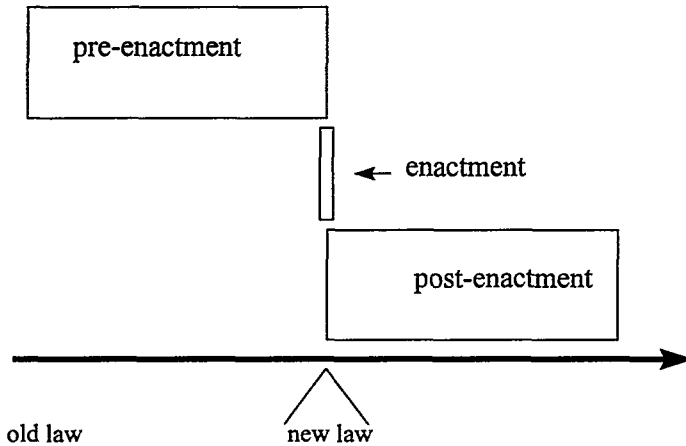
Theoretically, secondary retroactivity should be largely immune from legal attack because, while it affects pre-enactment private behavior, it does so only in the post-enactment future. Courts have seized upon this future-applying aspect of secondary retroactivity to justify its general validity.⁷² However, while such retroactivity is similar to prospectivity because it takes effect only after enactment, secondary retroactivity is unlike prospectivity because it draws upon antecedent facts for its implementation. As a result, secondary retroactivity produces negative consequences in three distinct time periods: (1) the pre-enactment period; (2) the date of enactment; and (3) the post-enactment period.

70. See *Giles v. Adobe Royalty, Inc.*, 684 P.2d 406, 412-13 (Kan. 1984) (declining to give a law retroactive effect is proper when there has been reliance on the settled nature of the prior law and application would result in substantial hardship).

71. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1456 (1995).

72. Many courts characterize statutes that apply to pre-enactment acts in the future as non-retrospective or non-retroactive. See, e.g., *Cox v. Hart*, 260 U.S. 427, 435 (1922); *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972); *Liberty Mut. Ins. Co. v. Whitehouse*, 868 F. Supp. 425, 435 (D.R.I. 1994).

FIGURE 2



1. The Pre-enactment Period

Legislative decisions that operate with secondary retroactivity act upon past circumstances and conduct. Those individuals whose behavior triggered these past events cannot do anything in the pre-enactment period to soften the blow of the new law. Therefore, with secondary retroactivity, the option of altering behavior to avoid the impact of the new law no longer exists.

When individuals are unable to evade a retroactive decision in the pre-enactment period, there are two related consequences. The first consequence involves *uncertainty*. Decisionmaking in the pre-enactment period becomes problematic because those making decisions are without knowledge concerning one critical variable—the probability that existing law will continue in the future. As a result of this uncertainty, decisionmaking during the pre-enactment

period may be chilled.⁷³ Individuals will be reluctant to act if they are unable to predict the likely outcome of a decision. They may be deterred by the possibility of a change in the law with secondary retroactive effects. These behavior changes in anticipation of retroactivity generate social costs which take the form of deferred investments and reduced risk-taking.⁷⁴ By contrast, laws announced in advance of private action allow individuals to predict how rules will be applied to their future behavior. Such predictability is critical to legal order.⁷⁵

The second negative consequence of retroactivity during the pre-enactment period involves *expectations*. When individuals cannot take steps in the pre-enactment period to evade the post-enactment imposition of new rules, settled expectations arising in the pre-enactment period are undermined. This result is inconsistent with a central purpose of law in a civilized society, which is to preserve the expectations of individuals that are formed in light of existing laws, as well as actions taken in reliance on those laws.⁷⁶ Laws that operate

73. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3 (1985) ("Uncertainty and insecurity make it difficult to plan, which prevents individuals from effectively utilizing their talents and external goals."); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 689-94 (1978) (describing the deterrent effect of uncertainty in a free speech context).

74. See FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 197-232, 313-75 (1921).

75. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897); see also *Landgraf*, 511 U.S. at 271 ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

76. See Munzer, *supra* note 5, at 427-28, 429, 430, 432.

An expectation is a disposition to predict that certain event will occur together with (characteristically) an attitude of being able to count on its occurrence.

....

... [T]he law should shelter legal expectations that are rational, or that are legitimate within the legal system.

....

... [A]n expectation is rational if the probability assigned to the predicted event corresponds suitably to the actual likelihood that it will occur. ...

....

The legitimacy of an expectation within a legal system depends on whether the expectation is supported ... by the underlying justifications of the laws inducing it. ...

with secondary retroactivity are inconsistent with this premise.⁷⁷ In the post-enactment period, such laws may defeat planned investments of labor, interfere with uses of property, conflict with personal autonomy, and impair contracts.⁷⁸ Such disruption in private patterns of conduct may be particularly severe if the old law had been in effect for a considerable time in the pre-enactment period.⁷⁹ As John Austin once observed, “[W]henver expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession . . . [is] pernicious.”⁸⁰

2. Enactment

At the time of enactment, a law that applies with secondary retroactivity violates one prime tenet of the Rule of Law: Persons subject to laws should have their behavior governed by rules fixed in advance, because such rules then provide fair notice and warning to those contemplating the action.⁸¹ As Justice Scalia observed: “The

Id. See also *Landgraf*, 511 U.S. at 265 (“[S]ettled expectations should not be lightly disrupted”); *Bott v. Commission of Natural Resources*, 327 N.W.2d 838, 849 (Mich. 1982) (stating that rules which induce “extensive reliance” should not be retroactively changed); *Krent*, *supra* note 8, at 2160 (“Individuals should be able to rely on existing law when ordering their affairs”).

77. See *Slawson*, *supra* note 5, at 219 (“(1) Individuals commonly act so as to achieve advantageous results. (2) Retroactive laws change the legal results of acts after these acts have been performed. (3) Therefore retroactive laws defeat reasonable expectations and are undesirable.”).

78. See *McDonald v. Watt*, 653 F.2d 1035, 1045-46 (5th Cir. Unit A Aug. 1981) (stating that retroactive application would cloud title to hundreds of leases); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600-01 (6th Cir. 1960) (finding no public interest justification for applying rule retroactively to private contract); see also *Slawson*, *supra* note 5, at 233 (“More than other kinds of legally significant action . . . contracting is likely to be done with knowledge of, and specific reliance on, the law.”).

79. See *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860-61 (2d Cir. 1966).

80. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE § 1138, at 256-57 (Robert Campbell ed., 1875). See also JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-12 (C. K. Ogden ed., 1931) (stating that security is the principal object of law, and “[a]s regards property, security consists in receiving no check, no derangement to the expectation founded on the laws”).

81. See *Landgraf*, 511 U.S. at 265, 270; see also *Phillips v. Curiale*, 608 A.2d 895, 899 (N.J. 1992) (noting the tension recognized by the court in *Kaiser* between applying the law in

principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.”⁸²

The enactment of secondarily retroactive legislation allows private behavior to be judged, post-enactment, by new, often unanticipated rules. If a number of laws are adopted which act with secondary retroactivity, individuals who find themselves surprised by new rules learn that they cannot plan conduct with reasonable certainty of the legal consequences. When market actors cannot plan because the relevant rules are uncertain, this may result either in a disinclination to act at all, or hedged action, where the actor takes cautious compensatory measures to protect against future loss.

A law that operates with secondary retroactivity also has an impact on existing property interests at the time of enactment. Although such laws are effective only in the future, because they apply to private property interests that existed prior to enactment, they alter the expected value of property at the moment of enactment. In other words, the change in expected future values will, at the time of enactment, change the present value of affected property. Therefore, property subject to laws that apply with secondary retroactivity sustain three value changes: (1) Prior to enactment of the new law, the value is determined by expectations based on the old law; (2) at the time of enactment, expected future value changes alter the present value; and (3) post-enactment, the value changes in the future as a result of the operation of the new law. Such price

effect at the time of decision and antiretroactivity principles); FULLER, *supra* note 6, at 209-10 (“Surely the very essence of the Rule of Law is that in acting upon the citizen . . . a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties.”); Krent, *supra* note 8, at 2143 (“[R]etroactive lawmaking conflicts with rule-of-law aspirations . . .”).

When a law has already put a party on notice of its effects, secondary retroactivity is permissible. See *DeBlasio v. Zoning Bd. of Adjustment*, 820 F. Supp. 876, 885 (D.N.J. 1993) (finding no taking resulted from zoning ordinance because plaintiff had notice). Reliance on the continuation of a law is unreasonable when the lawmaker has warned against such reliance, thus putting the private party on notice that reliance may be inappropriate. See *American Mach. Corp. v. NLRB*, 424 F.2d 1321, 1328-30 (5th Cir. 1970).

82. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

instability prevents market actors from making rational decisions about long-term investments.⁸³

Some commentators have argued that retroactive lawmaking encourages legislative self-dealing.⁸⁴ For instance, legislators could attempt to enact regulatory measures that would reward political contributors and pay back those who supported their campaigns. Retroactivity, particularly secondary retroactivity, may then be viewed not as a weapon to advance the public good, but as a tool to maximize the chances of legislators' re-election.⁸⁵

3. The Post-enactment Period

Secondary retroactivity seems contrary to fundamental notions of justice and fairness.⁸⁶ Unless an individual's pre-enactment conduct is assessed in the post-enactment period under the law that at the time the individual engaged in that conduct, "[the law] can deprive citizens of legitimate expectations and upset settled transactions."⁸⁷ These post-enactment effects are harmful to persons who have reasonably relied to their detriment on a pre-enactment law.⁸⁸ A new law applied retroactively thwarts reliance by impairing the

83. See Graetz, *supra* note 5, at 1822-23; Kaplow, *supra* note 67, at 520-50.

84. See Krent, *supra* note 8, at 2159.

85. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

86. See LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 701-703 (1949) (discussing the ability to legislate based on acceptance of the legislator); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1398, at 260 (4th ed. 1873) ("Retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of social compact."); see also *Landgraf*, 511 U.S. at 270, 280; *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990) (en banc); *Peoples Natural Gas Div. of N. Natural Gas Co., v. Public Utilities Comm'n*, 590 P.2d 960, 962 (Colo. 1979) (en banc).

The Constitution's Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3, was adopted to prevent the unfairness of punishing an act which was not punishable at the time it was committed. See *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

87. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

88. See Smith, *supra* note 5, at 418-19 (1928); Stimson, *supra* note 5, at 37-38; see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (stating that "demoralization costs" are the disabilities, in the form of impaired incentives or social unrest, to uncompensated losers and their sympathizers affected in part by retroactive laws).

advantages of planned conduct.⁸⁹ In the post-enactment period, secondary retroactivity may also remove a benefit currently enjoyed, take away property currently held, or deprive a person of liberty to act in a manner earlier permitted.⁹⁰

Lon Fuller maintained that the function of law was to provide a mechanism for eliminating “the blind play of chance” by clear and understandable rules previously declared and consistently applied.⁹¹ Secondary retroactivity is entirely at odds with this view of law. Conversely, prospectivity reduces the role of chance by removing the specter of behavior being judged by norms not yet in existence. Prospectivity allows for possible changes in behavior to reduce the risk of sanctions under existing laws. In addition, prospectivity is consistent with elemental notions of fairness which demand that “a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.”⁹²

Secondary retroactivity prevents persons from changing their pre-enactment behavior to reduce the likelihood that they will incur a post-enactment sanction.⁹³ Prospectivity also fosters predictability. Increased predictability permits individuals to make accurate value assessments, which will increase the probability that they will devote resources to maximize their utility.⁹⁴

Legislation that applies retroactively, even legislation that applies with secondary retroactivity, carries with it considerable costs. Parts III through V argue that in response to these costs, three principles have been judicially adopted which allow private parties otherwise burdened by retroactivity to defeat retroactive legislation: (1) a general prohibition against primary retroactivity; (2) a presumption of

89. See Smead, *supra* note 5, at 776-78.

90. See *infra* Part V (examining when persons have pre-enactment legal status that protects them from such secondarily retroactive effects).

91. See FULLER, *supra* note 6, at 9, 39.

92. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 (1996). See also Patton v. TIC United Corp., 77 F.3d 1235, 1243-44 (10th Cir. 1996).

93. See Cass, *supra* note 7, at 952-53.

94. See *id.* at 960-61.

nonretroactivity for legislation that otherwise could operate with secondary retroactivity; and (3) a willingness to invalidate even intentional secondary retroactivity when pre-enactment private action has protected legal status.

III. CHANGING JUDICIAL VIEWS OF PRIMARY AND SECONDARY RETROACTIVITY

The judiciary's traditional dislike of retroactive legislation can be traced back in time to an early, but highly influential Nineteenth Century case—*Society for the Propagation of the Gospel v. Wheeler*.⁹⁵ The *Wheeler* case recognized that statutes could be voided not just for applying with primary retroactivity, but also when they produced secondary retroactivity. As a result, for over a century much legislation affecting property and economic interests was avoidable simply for operating with secondary retroactivity. In the Twentieth Century, although legislation intended to apply with primary retroactivity was usually invalidated, statutes that operated with secondary retroactivity were typically sustained. Parts IV and V demonstrate how a combination of *Landgraf* and the concept of protected legal status have lately permitted courts to strike secondarily retroactive legislation.

A. *Original Recognition of Invalid Secondary Retroactivity*

In the early years of American legal history, at the beginning of the Nineteenth Century, there was dispute involving a central issue of retroactivity: For a legislative action to be deemed improperly retroactive, must it take effect before its enactment (i.e., primary retroactivity), or was it enough that, following its enactment, the legislation altered a pre-existing legal interest (i.e., secondary retroactivity)?⁹⁶ If the former, then laws could survive retroactivity

95. *Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

96. See WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS § 1, at 2 (1880).

challenges simply by taking effect as of the date of their adoption. If the latter, existing private economic and property interests created under an earlier legal regime could resist new legislation affecting these interests in the future.

In *Wheeler*, Justice Story rejected the view that only laws with primary retroactivity were invalid. Instead, he adopted the position that even statutes that are secondarily retroactive ("statutes, which, . . . operat[e] only from their passage") may be invalid.⁹⁷ The Court stated that if a statute satisfied this definition, it would be invalid either if it (1) "takes away or impairs vested rights acquired under existing laws," or (2) "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."⁹⁸ Under this conception of secondary retroactivity, statutes intended to become effective only *after* their passage could still be invalidated, if they either interfered with vested rights or imposed new duties or liabilities on earlier events.

The *Wheeler* notion of retroactivity did not mean that lawmakers could not change rules affecting existing legal interests. The prohibition against retroactive laws was limited to only those legal interests that had been determined by pre-existing law to be "vested" against substantive legislative modification.⁹⁹ These included rights that had been either vested by "contract,"¹⁰⁰ or otherwise protected by general prohibitions against deprivations of "property" except by due process.¹⁰¹ Retroactive laws could still reach all interests that were not vested, thereby avoiding a freezing of existing property rules that might otherwise have occurred if non-vested interests had been immune from legislative change.¹⁰²

97. 22 F. Cas. at 767.

98. *Id.*

99. See Kainen, *supra* note 6, at 105.

100. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

101. See *Watson v. Mercer*, 33 U.S. (8 Pet.) 88 (1834). See generally COOLEY, *supra* note 57, at § 353.

102. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL OTHODOXY* 149-151 (1992); Eric F. Freyfogel, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 106-108 (1995); James L. Kainen, *Nineteenth*

The *Wheeler* rule meant that retroactive legislation could not be saved simply by an express legislative desire to affect private interests post-enactment. More significantly, if the retroactivity was secondary, it could not be applied to existing private legal relationships if these had achieved protected legal status with respect to the new statute. Protected legal status existed whenever certain legal rights were deemed to be impaired, or if the statute operated to increase liability or impose a new duty on past conduct.

*B. The Rise of the Police Power and Decline of
Invalid Secondary Retroactivity*

By the middle of the Twentieth Century, the Supreme Court had largely abandoned the strict *Wheeler* rule. Its demise was caused by two difficulties associated with protecting “vested rights” from subsequent legislative change. First, because vested rights included many contract and property interests, courts had the power to review the wisdom of much secondarily retroactive legislation specifically intended to affect these interests, and to overturn this legislation if it “impaired” these interests. This seemed to be an excessive exercise of judicial power. Second, both commentators and courts believed that the term “vested right” was conclusory, and not helpful in predicting whether a law could be applied with secondary retroactivity to an existing interest.¹⁰³ The term was most often used to justify invalidating a retroactive law that was defective for reasons other than the law’s impact on vested rights.¹⁰⁴

For most of the Twentieth Century, retroactive legislation was not tested against the *Wheeler* rule. Instead, the Supreme Court simply determined whether the retroactivity was inconsistent with one of the property-protective clauses of the Constitution—the Due Process, Contracts, and Takings clauses. From the 1930s to the 1980s, the

Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State, 31 BUFF. L. REV. 381, 437 (1982).

103. See JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 6 (1953); Smith, *supra* note 5, at 233.

104. See Kainen, *supra* note 6, at 112-14.

judicial standard of review for these clauses was deferential rational basis review, and retroactive legislation was typically sustained.

When courts used substantive due process to determine the validity of secondarily retroactive laws, the legislation tended to be validated. Under substantive due process analysis, the retroactive aspects of legislation were no more than a factor to consider in deciding whether secondarily retroactive legislation had unconstitutionally interfered with existing property or economic rights.¹⁰⁵ The pertinent question was not the effect of the retroactive law on a “vested right,” or whether the law had created a “new obligation” burdening past transactions, or whether the law was unfair, but whether retroactivity was a useful means of carrying out the goal of the law.¹⁰⁶ The level of judicial review was extremely deferential, and if the retroactive aspects of the legislation were a “rational means” of furthering some legitimate legislative purpose, then the retroactive provisions of the law would meet the test of due process.¹⁰⁷ Moreover, if retroactive application of the new law was rational, it could safely “readjust existing rights” and “upset otherwise settled expectations.”¹⁰⁸

105. See *id.* at 111.

106. See *Concrete Pipe*, 508 U.S. at 637 (finding no due process violations “even though the effect of the legislation is to impose a new duty . . . based on past acts”); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-18 (1976); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832, 836 (6th Cir. 1995).

107. See *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729-30 (1984); *Eastern Enters. v. Chater*, 110 F.3d 150, 156-57 (1st Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085 (July 3, 1997) (No. 97-42); *Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383, 387-88 (7th Cir. 1997); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137-38 (4th Cir. 1996); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 607 (Cal. 1994).

108. *Usery*, 428 U.S. at 16. See also *R. A. Gray & Co.*, 467 U.S. at 729-30; *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995) (upholding the Coal Act even though it upsets settled expectations and imposes new duties or liabilities based on past acts); *Barrick Gold Exploration*, 47 F.3d at 837-38; *Lisbon Square v. United States*, 856 F. Supp. 482, 490 (E.D. Wis. 1994). See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 139-40 (1992).

Litigants were equally unsuccessful when they attempted to raise retroactivity concerns in the context of non-due process constitutional protections. During the *Wheeler* era, contract rights were considered among the most sacrosanct vested rights protected against retroactive legislation.¹⁰⁹ By the latter part of the Twentieth Century, however, the Supreme Court had largely gutted the Contracts Clause as a weapon to use against retroactivity. Even when a statute was found to operate as a substantial impairment of an existing contractual relationship, the statute was usually acceptable if “the legislature’s adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.”¹¹⁰ Unless a state was itself a contracting party, courts typically deferred to a legislature’s decision to retroactively alter existing private contract interests.¹¹¹

When property rights were not in contract form (and arguably protected by the Contracts Clause), litigants looked to the Takings Clause as the constitutional provision that might protect existing property interests which had been adversely affected by a retroactive change in applicable law. This was particularly so after the Supreme Court stated in *Penn Central Transportation Co. v. New York City*¹¹² that one factor that should be taken into account when determining if a regulation was an unconstitutional taking was whether it had “interfered with distinct investment-backed expectations.”¹¹³ This protection of “investment-backed expectations” seemed to parallel the *Wheeler* admonition against retroactive laws which either impaired rights acquired under existing laws, or imposed new duties on past “transactions or considerations.” The “investment-backed

109. See *supra* note 101.

110. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987) (internal quotations omitted). See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8th Cir. 1994).

111. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21-28 (1977).

112. 438 U.S. 104 (1978).

113. *Id.* at 124.

expectations" approach seemed to permit takings recoveries for owners who could demonstrate that they had purchased their property or made decisions about their property in reliance on an expectation that did not include the challenged new regulation.

However, the Court quickly narrowed the scope of the protection afforded property rights under the *Penn Central* takings test. A distinct investment-backed expectation had to be more than a unilateral expectation or an abstract need.¹¹⁴ There could be no taking for retroactively-applying laws based on the *Penn Central* "expectation" theory if the private property owner (1) had long been subject to similar laws,¹¹⁵ or (2) had somehow been put on notice that a change in the law was possible.¹¹⁶ Notice could be constructive and was implied if those subject to the new law operated in a heavily regulated field.¹¹⁷ A property owner who acted with constructive knowledge of a future restraint could be said either to have no reliance interest, or to have assumed the risk of any subsequent economic loss.¹¹⁸

114. See *United States v. Locke*, 471 U.S. 84, 106-07 n.15 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074-75 (Fed. Cir. 1994) (concluding that bank holding company had no reasonable expectation that the FDIC would not take over insolvent bank).

115. See *Concrete Pipe*, 508 U.S. at 645-46; *R. A. Gray & Co.*, 467 U.S. at 731-733; *Farmers Home Admin. v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

116. See *Concrete Pipe*, 508 U.S. at 645-46 (finding no reasonable expectation in light of Congress' legislation in the pension field); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (same); *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996) (finding owner on notice that government actions were being planned); *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1581 (Fed. Cir. 1995) (stating that lessor, as a member of the public, was on notice that the federal government could close an office leased to a foreign government); *Ciampitti v. United States*, 22 Cl. Ct. 310, 321-22 (Cl. Ct. 1991) (determining that landowner who purchased wetlands with knowledge of the regulatory structure and the difficulty of developing wetlands had no reasonable investment-backed expectation).

117. See *Darlington, Inc.*, 358 U.S. at 91; *Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1389 (11th Cir. 1994).

118. See *Yee v. City of Escondido*, 503 U.S. 519, 528-530 (1992) (concluding that owner of mobile home park knew rents could be regulated and invited tenants). Even if a private party has a reasonable expectation that applicable law will not change, there is still no taking under the *Penn Central* formulation if that party's "expectations can continue to be realized as long as he complies with reasonable regulatory restrictions . . ." *Locke*, 471 U.S. at 107.

Judicial abandonment of the *Wheeler* rule, coupled with the courts' reluctance to use of the Constitution's property-protective clauses to halt backwards-looking legislation, meant that secondary retroactivity was routinely upheld by courts. Throughout much of the Twentieth Century, the judiciary sustained legislation that imposed conditions on private parties which made it more difficult, more expensive, or impossible in the post-enactment period either to: (1) obtain a valuable legal interest despite taking steps to secure that interest in the pre-enactment period,¹¹⁹ or (2) retain such an interest.¹²⁰

119. Examples of acceptable conditions that impose a barrier to the receipt of a legal interest include the imposition of fees, *see* *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995); *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991); *Student Loan Mktg. Ass'n v. Riley*, 907 F. Supp. 464 (D.D.C. 1995); *Russ Bldg. Partnership v. City of San Francisco*, 750 P.2d 324 (Cal. 1988); *Blue Jeans Equities W. v. City of San Francisco*, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992), a land dedication requirement as a condition to a building permit, *see* *Pengilly v. Multnomah County*, 810 F. Supp. 1111 (D. Or. 1992), or compliance with a low-income housing law as a condition to prepayment of a loan, *see* *Parkridge Investors Ltd. Partnership v. Farmers Home Admin.*, 13 F.3d 1192 (8th Cir. 1994).

120. Examples of acceptable conditions subsequent (usually imposed as a requirement to retain an interest) include: a new obligation to obtain a permit, *see* *American Mining Congress v. EPA*, 965 F.2d 759, 769-70 (9th Cir. 1992) (EPA rule requiring storm water discharge permits for inactive mining operations), charges for the privilege of construction granted under prior federal contracts, *see* *East Columbia Basin Irrigation Dist. v. Federal Energy Regulatory Comm.*, 946 F.2d 1550 (D.C. Cir. 1991), or annual filing, *see* *Locke*, 471 U.S. at 104-07 (holders of preexisting unpatented mining claims must comply with law requiring annual filing of affidavit of assessment work, or forfeit the claim); *see also* *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Other acceptable conditions subsequent include future compliance with environmental requirements, *see* *Zerbetz v. Municipality of Anchorage*, 856 P.2d 777 (Alaska 1993) (holding that municipality's designation of private property as "conservation wetlands" is not a compensable taking); *Public Resources Protection Ass'n of California v. Department of Forestry & Fire Protection*, 5 Cal. Rptr. 2d 475 (Cal. Ct. App. 1992) (holding that timber harvest plan approved before enactment can be conditioned on consistency with the Endangered Species Act); *Adams v. Thurston County*, 855 P.2d 284, 291 (Wash. Ct. App. 1993) (stating that the vesting of development rights does not defeat a county's discretionary ability to condition or deny a plat based on environmental impacts), future compliance with new social and welfare requirements, *see* *Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993) (application of the Americans with Disabilities Act to existing places of accommodation), disclosure of data, *see* *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435 (9th Cir. 1990) (utility required to supply schematic drawings of facilities on non-federal, non-Indian lands), conformance with the conditions of a new rent control law, *see* *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993) (rent control and vacancy control law for mobile homes); *Rent Stabilization Ass'n of New York City, Inc. v. Dinkins*, 805 F. Supp. 159 (S.D.N.Y. 1992) (establishment of mandatory annual rent increase guidelines); *Cope v. City of*

Legislation was also sustained that limited¹²¹ or prohibited¹²² the future use of existing property, imposed on the party a future duty or

Cannon Beach, 855 P.2d 1083 (Or. 1993) (ordinance prohibiting transient occupancy); *Margola Assocs. v. City of Seattle*, 854 P.2d 23 (Wash. 1993) (en banc) (requirement that rental units be registered and fees paid), and a requirement that an additional bond be posted, *see Universal Equip. Co. v. State Dep't of Env'tl. Quality*, 839 P.2d 967 (Wyo. 1992) (additional bond to insure reclamation of mine site). Sometimes a condition subsequent can be imposed on a private party's ability to withdraw from a relevant market. *See Concrete Pipe*, 508 U.S. at 644-46 (increased liability if employer withdraws from pension plan); *In re "Plan for Orderly Withdrawal from New Jersey"* of Twin City Fire Ins. Co., 609 A.2d 1248 (N.J. 1992) (stating that insurer must comply with automobile insurance reform act during its five-year withdrawal from the state market).

121. *See Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994) (revocation of building permits reducing size of project); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (clean air plan requiring a 25 percent reduction in the number of available employee parking spaces); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993) (Army Corps cease and desist order stops planned development); *McKinley v. United States*, 828 F. Supp. 888 (D.N.M. 1993) (reduction in number of cattle permitted to graze on allotment located in national forest); *Brown v. City of Twin Falls*, 855 P.2d 876 (Idaho 1993) (placement of road median barriers by city and state restrained business traffic flow to landowner's property). *But see County of Anoka v. Esmailzadeh*, 498 N.W.2d 58, 60-61 (Minn. Ct. App. 1993) (owner's loss of access to highway resulting from installation of median could be compensable taking of property).

The most drastic limit placed on an existing property interest is a law imposing a moratorium on the property's future use or development. A moratorium is usually valid. *See Pro-Eco, Inc. v. Board of Comm'rs of Jay County*, 57 F.3d 505 (7th Cir. 1995) (moratorium on landfills); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994) (temporary water moratorium); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993) (temporary moratorium on construction in an area pending completion of a study); *767 Third Ave. Assocs.*, 48 F.3d at 1577 (lessor lost rent upon federal closure of offices of foreign government); *Herrington v. City of Pearl*, 908 F. Supp. 418, 424-26 (S.D. Miss. 1995) (moratorium on new mobile home sales establishments); *Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316 (D. Nev. 1992) (temporary moratorium on issuance of building permits); *Williams v. City of Central*, 907 P.2d 701 (Colo. Ct. App. 1995) (moratorium on special use permits); *Sun Ridge Dev., Inc. v. City of Cheyenne*, 787 P.2d 583 (Wyo. 1990) (temporary moratorium on construction in residential subdivision); *see also Burlington N. R.R. v. United Transp. Union*, 822 F. Supp. 797, 802-03 (D.D.C. 1991) (stating that Congress can regulate pre-existing moratoria agreements). *But see Adamson Companies v. City of Malibu*, 854 F. Supp. 1476, 1491 (C.D. Cal. 1994) (three year moratorium imposed by rent control law violative of due process).

A law can also produce future changes in the relevant method of calculating the following values: pre-enactment salaries, *see Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012 (4th Cir. 1993) (salary reductions), lease reimbursements, *see Anco, Inc. v. State Health & Human Servs. Fin. Comm'n*, 388 S.E.2d 780, 786-87 (S.C. 1989) (new reimbursement policy for nursing homes under Medicaid state plan), utility rates, *see Town of Norwood v. Federal Energy Regulatory Comm.*, 53 F.3d 377, 381 (D.C. Cir. 1995) (future rates can reflect past costs when it was always planned to charge future ratepayers for these costs); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1176 (11th Cir. 1993) (increased

liability for actions that took place in the past,¹²³ changed in the future the legal classification of a private interest,¹²⁴ or applied a new requirement to pending claims and actions.¹²⁵

rates in proportion to the cost of debt service bonds), royalties, *see* *Western Energy Co. v. United States Dep't of Interior*, 932 F.2d 807 (9th Cir. 1991); *Mesa Operating Ltd. Partnership v. United States Dep't of Interior*, 931 F.2d 318 (5th Cir. 1991) (method of calculating royalty payment); *Coastal States Energy Co. v. Hodel*, 816 F.2d 502 (10th Cir. 1987), and taxes, *see* *Mostoway v. United States*, 966 F.2d 668, 670-71 (Fed. Cir. 1992) (income subject to varying tax treatment when tax laws change).

122. A law may prohibit the future use of existing property by: forbidding one use of a private party's property, *see* *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129-30 (7th Cir. 1995) (holding that ordinance forbidding sale of spray paint within city limits does not violate store owner's substantive due process rights); *Marrero Garcia v. Irizarry*, 829 F. Supp. 523 (D.P.R. 1993) (utility may disconnect service to condominium residents who are not subscribers); *Naegle Outdoor Adver., Inc. v. City of Durham*, 803 F. Supp. 1068, 1079 (M.D.N.C. 1992) (ordinance prohibiting all commercial off-premises advertising signs); *Boulder City v. Cinnamon Hills Assocs.*, 871 P.2d 320 (Nev. 1994) (denial of building permit to construct senior housing project); *Unit Petroleum Co. v. Oklahoma Water Resources Bd.*, 898 P.2d 1275 (Okla. 1995) (same); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex. 1996) (law forbidding depletion of underground aquifer), all uses of private property that produce a harmful effect, *see* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (state law may prohibit coal mining that causes subsidence damage), *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995) (federal law can forbid coal mining causing subsidence), or virtually all uses of the property by denial of a permit, *see* *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (denying land use permit on ground that development would impair deer habitat); *1902 Atl. Ltd. v. United States*, 26 Cl. Ct. 575 (Cl. Ct. 1992) (denying Clean Water Act permit to discharge dredged or fill material due to presence of wetlands). *But see* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

123. CERCLA strict liability may be applied retroactively. *See* *United States v. Monsanto Co.*, 858 F.2d 160, 173-74 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-34 (8th Cir. 1986); *Ninth Ave. Remedial Group v. Fiberbond Corp.*, 946 F. Supp. 651 (N.D. Ind. 1996); *Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); *Nevada Dep't of Transp. v. United States*, 925 F. Supp. 691, 692-704 (D. Nev. 1996); *American Color & Chem. Corp. v. Tenneco Polymers, Inc.*, 918 F. Supp. 945, 960 (D.S.C. 1995); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 790-1 (D.N.J. 1989); *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 556 (W.D.N.Y. 1988); *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 676-77 (D.N.J. 1987) (applying the CERCLA amendments retroactively); *see also* *Murphy v. Amoco Prod. Co.*, 729 F.2d 552 (8th Cir. 1984) (stating that state law may change the applicable duty of care owed under a lease from a negligence standard to a strict liability standard); *Petropoulos v. Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511, 515 (S.D. Ohio 1993) (holding that the Solid Waste Disposal Act may apply retroactively); *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713 (S.D. Ind. 1991) (applying state underground storage tank laws retroactively); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 64-65 (D.N.H. 1990) (holding state environmental cleanup discharge before

C. Continued Invalidity of Primary Retroactivity

Although courts upheld most of the Twentieth Century legislation that applied with secondary retroactivity, courts generally invalidated laws that altered the past legal consequences of past action. Such primary retroactivity was thought to be especially harsh, and usually void, since the new rule did not merely affect past transactions; it also changed what the law was in the past when these transactions occurred. Unlike secondary retroactivity, which has an exclusively future effect on past transactions, primary retroactivity alters the past legal consequences of past private behavior. Consequently, legislation that operates with primary retroactivity violates two

enactment of law); *United States v. Price*, 523 F. Supp. 1055, 1067, 1071-72 (D.N.J. 1981) (holding that the Resource Conservation and Recovery Act may be applied retroactively); *New Jersey Dep't of Env'tl. Protection v. Ventron Corp.*, 468 A.2d 150, 163 (N.J. 1983) (applying New Jersey Spill Act to hazardous waste spills occurring before passage of the Act).

In *Concrete Pipe*, the Supreme Court found a federal statute that increased an employer's liability from 30% to 46% of its net worth upon withdrawal from a benefit plan an acceptable form of secondary retroactivity. *See* 508 U.S. 602 (1993); *see also* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding retroactive effect of federal law imposing liability on coal mine employers for employee disabilities caused by black lung disease); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 740 (4th Cir. 1996) (stating that Coal Act may impose a new obligation based on past acts); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137 (4th Cir. 1996) (upholding imposition of new duties on existing contract); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995) (upholding retroactive provisions of the Coal Industry Retiree Health Benefit Act requiring coal operators to pay health benefits to retirees); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir. 1995) (concluding that Coal Industry Retiree Health Benefit Act of 1992 may apply retroactively). A legislature may also impose an additional duty on a licensee. *See Mitchell v. Clayton*, 995 F.2d 772 (7th Cir. 1993) (stating that the legislature can impose additional educational requirements on acupuncturists who have already obtained licenses).

124. *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 262 (7th Cir. 1995) (changing the terms of an existing liquor license); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135 (2d Cir. 1984) (reducing the maximum allowed floor area ratio); *Elias v. Town of Brookhaven*, 783 F. Supp. 758 (E.D.N.Y. 1992) (changing zoning restrictions from commercial to residential).

125. *See Swanson v. Babbitt*, 3 F.3d 1348 (9th Cir. 1993) (holding that enactment of Sawtooth National Recreation Area Act precludes issuance of patents after the Act's effective date even though applications were pending on effective date); *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 676 (D.N.J. 1987) (amendments to CERCLA may apply to litigation pending at the time of the amendments' enactment); *Citizens For Equity v. New Jersey Dep't of Env'tl. Protection*, 599 A.2d 516 (N.J. Super. Ct. App. Div. 1990) (imposing a sale requirement to prove value diminution on pending claims created only future effects and was therefore permissible secondary retroactivity).

fundamental jurisprudential principles: (1) persons should not be penalized in the past for making decisions in good faith reliance on rules in effect at the time the decision was made,¹²⁶ and (2) the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.¹²⁷

Primary retroactivity usually occurs in two ways. First, the legislative body can adopt a new law that deprives a private party of a past valuable benefit by declaring as void the past legal basis for the benefit.¹²⁸ Second, the new law may impose a penalty or burden on past private action.¹²⁹ In both situations, the fact that the law operates

126. See generally FULLER, *supra* note 6, at 53.

127. See *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 855 (Scalia, J., concurring).

128. Examples of this kind of invalid primary retroactivity include enactment of a statute which deprives a company of distributions of money already made under a pre-enactment contract, see *In re Workers' Compensation Refund W. Nat'l Ins. Co.*, 46 F.3d 813, 818-19 (8th Cir. 1995), reinterpretation of an ordinance to reflect an earlier termination date of an approved development plan than was previously represented, see *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994), cancellation of a previously valid permit, see *NRG Co. v. United States*, 24 Cl. Ct. 51 (Cl. Ct. 1991) (holding that cancellation of mineral prospecting permit was an unconstitutional taking); but see *Achtien v. City of Deadwood*, 814 F. Supp. 808, 815-16 (D.S.D. 1993) (city can rescind previously-issued building permit if the city believes it was illegal at the time of issuance), rescission of a previously acceptable buy-out rule, see *State ex rel. Reider's, Inc. v. Industrial Comm'n of Ohio*, 549 N.E.2d 532 (Ohio Ct. App. 1988), denial of an award of benefits to which the recipient was otherwise entitled, see *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 705 (R.I. 1993); *Guerrero v. Adult & Family Servs. Div.*, 676 P.2d 928 (Or. Ct. App. 1984) (under former rule agency had discretion to reimburse), and nullification of an otherwise valid judgment, see *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (holding that Congress may not subject an earlier judgment to a reopening requirement that did not exist when the judgment was announced); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (upholding Westfall Act because it only applies to cases not yet final); *Burch v. Monroe*, 834 P.2d 33, 35-36 (Wash. Ct. App. 1992).

129. For example, a new law may seek to make past conduct subject to (1) disciplinary action, see *Jordan v. Department of Prof'l Regulation*, 522 So. 2d 450 (Fla. Dist. Ct. App. 1988), (2) higher taxes, see *Blodgett v. Holden*, 275 U.S. 142 (1927) (holding that gift tax may not apply to gifts made prior to enactment), (3) third party approval, see *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), or (4) less favorable rates, see *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 594 So. 2d 357 (La. 1992). However, if rates are increased in the future to recover costs incurred in the past, the rate change is not primarily, but secondarily, retroactive and therefore valid. See *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171 (11th Cir. 1993). But see *City of Piqua v. Federal Energy Regulatory Comm.*, 610 F.2d 950, 954-55 (D.C. Cir. 1979) (stating that if a utility includes an estimate of costs in its rates which is subsequently found to be too low, it cannot adjust future rates to recoup past losses).

with primary retroactivity is generally sufficient, by itself, to invalidate it.

Courts will uphold laws that are primary retroactive in rare instances. A new law may be given primary retroactive effect when doing so is necessary to protect private rights otherwise adversely affected by past inequitable behavior of other private parties.¹³⁰ Primary retroactivity is also generally acceptable when the new law does not impose new past liability on past action but merely changes the amount of damages available or taxes due.¹³¹ Courts view imposing a new past liability on individuals as a substantive change and therefore impermissible,¹³² but generally allow retroactive modification of damages or tax on the theory that they are remedial in nature.¹³³ For primary retroactive legislation to be impermissible, the legislation must *change* past legal consequences; it is not enough that the legislation has a marketplace effect that adversely affects the past decisions of private parties.¹³⁴

130. See, e.g., *Cowling v. Board of Oil, Gas & Mining*, 830 P.2d 220, 228-29 (Utah 1991) ("If . . . an operator of a well engages in inequitable conduct by wrongfully delaying an application for a [well] spacing order, thereby prejudicing another's correlative right, the Board may make appropriate adjustments as to the date the pooling order is effective. That is, a pooling order may be made effective prior to the entry of a spacing order . . .").

131. See, e.g., *United States v. Stocker*, 798 F. Supp. 531, 534-35 (E.D. Wis. 1992) (concluding that retroactive application of damages provision merely affects the amount of damages not any substantive law).

132. See *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 228-29 (7th Cir. 1992); see also *Stocker*, 798 F. Supp. at 535.

133. See *United States v. Carlton*, 512 U.S. 26 (1994) (characterizing retroactive tax legislation as curative); *Littlefield v. McGuffey*, 954 F.2d 1337, 1345 (7th Cir. 1992) (holding that removal of a punitive damages cap is applicable retroactively). But see *Plaut*, 115 S. Ct. at 1462 ("[R]eliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity [has been] rejected . . .") (internal citations omitted).

134. In *Armour & Co. v. Inver Grove Heights*, a property owner unsuccessfully claimed that past planning activities of the city had "taken" his property by making it less attractive to potential buyers. 2 F.3d 276 (8th Cir. 1993). See also *Marietta Realty, Inc. v. Springfield Redevelopment Auth.*, 902 F. Supp. 310 (D. Mass. 1995) (stating that authority's failure to fulfill its public announcement of its intent to acquire private property is not a taking of that property).

IV. THE PRESUMPTION AGAINST RETROACTIVE SUBSTANTIVE LEGISLATION AND THE MODERN ERA DEFINITION OF RETROACTIVITY

The precise holding of the *Landgraf* Court is that when a legislature has not made its intention known about whether a statute is to be applied retroactively, its substantive provisions will only be given prospective effect.¹³⁵ The resulting presumption against legislative retroactivity may be rebutted with "clear legislative intent."¹³⁶ Perhaps more importantly, *Landgraf* also adopts a definition of retroactivity that requires the presumption to apply only to statutes whose legal effect satisfies the *Wheeler* test.¹³⁷ The *Wheeler* test not only encompasses retroactivity which is secondary,¹³⁸ but also statutes which impair existing rights, increase

135. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-73 (1994). See, e.g., *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (stating that absent legislative intent to the contrary, statutes do not operate retroactively); *James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277, 279-80 (6th Cir. 1995) (holding that the 1992 Cable Act applies prospectively only because the statute lacks strong and imperative language requiring retroactive application); *United States v. AM Gen. Corp.*, 34 F.3d 472, 474-75 (7th Cir. 1994) (holding that the EPA cannot collaterally attack a permit by bringing a civil penalty action many years after the permit had been granted, when no indication that Congress meant to authorize such retroactive application of the Clean Air Act); *Powell v. New York*, 869 F. Supp. 106, 112-13 (N.D.N.Y. 1994) (holding that the Americans with Disabilities Act of 1990 does not apply retroactively to claims accruing before its effective date); *Roark v. Crabtree*, 893 P.2d 1058, 1061-62 (Utah 1995) (holding that legislative extension of a civil statute of limitations cannot be applied retroactively in the absence of legislative intent).

136. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-73. Compare *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 212 (9th Cir. 1995) (stating that lack of clear congressional intent requires application of default rule against retroactivity), with *Stattin v. Resolution Trust Corp.*, 883 F. Supp. 678, 683-84 (M.D. Fla. 1995) (finding legislative intent rebutted presumption against retroactivity).

137. See *supra* notes 97-102 and accompanying text. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, the Court noted that the *Wheeler-Landgraf* definition of retroactivity was a "sufficient," but not a "necessary" condition, to the presumption against retroactivity. 117 S. Ct. 1871, 1876 (1997). After *Hughes Aircraft*, more functional conceptions of retroactivity can trigger the presumption.

138. See *Landgraf*, 511 U.S. at 267-70 ("[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); *Mills v. Amoco Performance Prods., Inc.*, 872 F. Supp. 975, 985 (S.D. Ga. 1994) (concluding that in a claim

liability for past conduct, or impose new duties with respect to completed transactions.¹³⁹ As a result, even when private parties cannot establish that their pre-enactment conduct has achieved protected legal status, a court may refuse to apply a statute retroactively if the legislature does not explicitly demand that effect.

A. Presumptive Legislative Prospectivity

1. Genesis of and Justifications for the Presumption

Prior to *Landgraf*, there was much uncertainty about whether courts should apply new legislation retroactively or prospectively when there was no guiding legislative intent. The confusion was caused by what the Supreme Court identified as an “apparent tension” between two lines of cases.¹⁴⁰ One line of Supreme Court cases—*United States v. Schooner Peggy*,¹⁴¹ *Thorpe v. Housing Authority of Durham*,¹⁴² and *Bradley v. School Board of Richmond*¹⁴³—seemed to establish a general presumption in favor of legislative retroactivity. The *Bradley* Court articulated “the principle that a court is to apply the law in effect at the time of the decision.”¹⁴⁴ The second line of cases culminated in the 1988 case *Bowen v. Georgetown University Hospital*,¹⁴⁵ where the Court flatly stated that “[r]etroactivity is not favored in the law.”¹⁴⁶ In 1990, some members of the Court described this conflict as an “irreconcilable contradiction.”¹⁴⁷

comprising both pre-enactment and post-enactment conduct, the *Landgraf* presumption applies to prevent retroactive application of new damages provision to any pre-enactment conduct).

139. See *Landgraf*, 511 U.S. at 280.

140. See *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 837.

141. 5 U.S. (1 Cranch) 103 (1801).

142. 393 U.S. 268 (1969).

143. 416 U.S. 696 (1974).

144. *Id.* at 711.

145. 488 U.S. 204, 208 (1988).

146. *Id.* at 208. The Court had articulated a similar view in *United States v. Security Industrial Bank*, 459 U.S. 70, 79-80 (1982).

147. *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 841 (Scalia, J., concurring).

The confusion between the two seemingly contradictory presumptions led to judicial opinions by lower courts which tended to "rely upon [the] conflicting precedent to reach equally conflicting results."¹⁴⁸ The conflict was particularly evident in cases involving the Civil Rights Act of 1991.¹⁴⁹ The purposes of the 1991 Act were to strengthen the federal civil rights laws¹⁵⁰ and to provide additional remedies for claims alleging civil rights violations.¹⁵¹ Congress

148. *James v. American Int'l Recovery, Inc.*, 799 F. Supp. 1156, 1162 (N.D. Ga. 1992). See *Wright v. Director, Federal Emergency Management Agency*, 913 F.2d 1566, 1573 (11th Cir. 1990) (stating that *Bradley's* presumption in favor of retroactivity created a dramatic shift in the law of retroactivity). Compare, e.g., *United States v. Stocker*, 798 F. Supp. 531 (E.D. Wis. 1992) (allowing retroactive application of the 1986 amendments to the False Claims Act), with *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991) (holding that district court erred in applying False Claims Act amendments retroactively), and *Thomas v. Frank*, 791 F. Supp. 470, 476 (D.N.J. 1992) (stating that legislation which imposes unforeseen obligations on pre-legislation conduct should not be applied retroactively).

149 For example, the Ninth Circuit found that the 1991 Act applies retroactively. See *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993); *Davis v. City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). Accord *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172 (S.D.N.Y. 1992); *Coulter v. Newmont Gold Co.*, 799 F. Supp. 1071 (D. Nev. 1992); *Jaekel v. Equifax Mktg. Decision Sys., Inc.*, 797 F. Supp. 486 (E.D. Va. 1992); *Tyler v. Pennsylvania Dep't of Revenue*, 793 F. Supp. 98 (M.D. Pa. 1992); *Robinson v. Davis Memorial Goodwill Indus.*, 790 F. Supp. 325 (D.D.C. 1992); *Sample v. Keystone Carbon Co.*, 786 F. Supp. 527 (W.D. Pa. 1992); *United States v. Department of Mental Health*, 785 F. Supp. 846 (E.D. Cal. 1992); *Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872 (S.D. Fla. 1992); *Sanders v. Culinary Workers Union Local No. 226*, 783 F. Supp. 531 (D. Nev. 1992); *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992).

Other jurisdictions and courts, however, concluded that the 1991 Act should only apply prospectively. See *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1267 (5th Cir. 1992); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53 (5th Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Johnson v. Uncles Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Banas v. American Airlines*, 969 F.2d 477 (7th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992); *Davis v. Tri-State Mack Distribs., Inc.*, 981 F.2d 340 (8th Cir. 1992); *Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992); *Parton v. GTE North, Inc.*, 971 F.2d 150 (8th Cir. 1992); *Hicks v. Brown Group, Inc.*, 982 F.2d 295 (8th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992).

150. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (purposes of the amendments).

151. See Symposium, *The Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Douglas W. Kmiec, *The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma*,

enacted the 1991 Act in response to a 1989 Supreme Court decision which limited the remedies available for various civil rights violations.¹⁵² The 1991 Act expanded the definition of an employment contract,¹⁵³ for which damages could be claimed if discrimination was proven, and provided for jury trials,¹⁵⁴ additional damage claims,¹⁵⁵ and witness fees.¹⁵⁶ Most of the Act's provisions were to be effective on the date the Act was passed, but the language was unclear as to whether they should apply retroactively or prospectively.¹⁵⁷

Most lower courts tended to adopt the *Bowen* presumption of prospectivity that was eventually adopted in *Landgraf*. The rationales offered by these courts included the following: (1) the traditional and historic rule of construction that legislation must be addressed to the future, and therefore, a statute should not be given retrospective operation interfering with antecedent rights;¹⁵⁸ (2) the fear that if the enormous power of the legislature can be applied to past (as well as future) conduct, it might "produce massive dislocations in ongoing litigation and defeat [reasonable] reliance interests";¹⁵⁹ and (3) the

68 NOTRE DAME L. REV. 911 (1993); see also Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993); Thamer E. Temple III, *Retroactivity of the 1991 Civil Rights Act in Title VII Cases*, 43 LABOR L.J. 299 (1992).

152. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

153. See 42 U.S.C. § 1981(b) (1994).

154. See 42 U.S.C. § 1981a(c).

155. See 42 U.S.C. § 1981a(b).

156. See 42 U.S.C. § 1988.

157. See Temple, *supra* note 151.

158. See *Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-64 (1928); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 (11th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 935 (7th Cir. 1992); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 963-64 n.6 (D.C. Cir. 1990); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1390 (10th Cir. 1990); *Sargisson v. United States*, 913 F.2d 918, 923 (Fed. Cir. 1990); *Tyger Constr. Co. v. United States*, 28 Fed. Cl. 35, 49-50 (Fed. Cl. 1993); cf. *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993).

159. *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 228-29 (7th Cir. 1992), quoted in *Hicks v. Brown Group, Inc.*, 982 F.2d 295, 298 (8th Cir. 1992) (stating that when Congress "overrules" a Supreme Court decision it is not necessarily "restoring" the prior law, and therefore is not interfering with reliance interests; rather, it is laying down a new rule of conduct for the future).

common sense notion implicit in *Bowen* that persons should be able to "conform their present conduct to existing rules of law without the risk of retrospective liability."¹⁶⁰

The *Landgraf* presumption of prospectivity for new legislation appears to be a correct resolution of the *Bradley-Bowen* conflict.¹⁶¹ As a matter of history and tradition, prospective application for legislation has been the rule among courts.¹⁶² Prospective application of legislation and is based on ancient Roman and English common law.¹⁶³ It is also in accord with over 150 years of American tradition through countless judicial rulings,¹⁶⁴ and state constitutional prohibitions against retroactive legislation.¹⁶⁵ By contrast, a presumption of legislative retroactivity runs completely contrary to this well-established history; indeed, *Bradley's* presumption of

160. *Baynes*, 976 F.2d at 1373. See also *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991) (stating that the role of legislatures is to set rules to govern future conduct); *Kemp v. Flygt Corp.*, 791 F. Supp. 48, 50-51 (D. Conn. 1992); *Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077, 1080-81 (E.D. Va. 1992). Some lower courts adopted *Bowen* partly because it was the more recent Supreme Court case. See *Tyree v. Riley*, 783 F. Supp. 877, 892 (D.N.J. 1992).

161. When legislative intent on the issue of retroactivity is missing, post-*Landgraf* cases have had no difficulty in interpreting new substantive statutes so prospectively. See, e.g., *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 212 (9th Cir. 1995); *Carter v. Sedgwick County*, 36 F.3d 952, 955 (10th Cir. 1994); *Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029, 1031-33 (10th Cir. 1994); *Hook v. Ernst & Young*, 28 F.3d 366, 368 (3d Cir. 1994). However, courts will apply non-substantive changes to pre-enactment conduct. See *Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1388 (11th Cir. 1994) (stating that because the Act did not impose substantive changes, its application was not considered retroactive); cf. *Rodriguez v. General Motors Corp.*, 27 F.3d 396 (9th Cir. 1994) (stating that the presumption of prospectivity only applies to substantive changes); *Mills v. Amoco Performance Prods., Inc.*, 872 F. Supp. 975, 985 (S.D. Ga. 1994).

162. See *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 935-36 (7th Cir. 1992); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1390 (10th Cir. 1990); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990); *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990); *Kemp Indus., Inc. v. Safety Light Corp.*, 857 F. Supp. 373, 396 (D.N.J. 1994); *Raya v. Maryatt Indus.*, 829 F. Supp. 1169, 1172-73 (N.D. Cal. 1993); *Stout v. IBM Corp.*, 798 F. Supp. 998, 1007 (S.D.N.Y. 1992).

163. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374 (8th Cir. 1992).

164. See, e.g., *Gersman v. Group Health Ass'n*, 975 F.2d 886, 896-97 (D.C. Cir. 1992); *Alpo Petfoods*, 913 F.2d at 964 n.6; *Tyree*, 783 F. Supp. at 881; *Ficarra*, 849 P.2d at 12.

165. See, e.g., COLO. CONST. art. II, § 11; GA. CONST. art. I, § 1, ¶ X; IDAHO CONST. art. XI, § 12; MO. CONST. art. I, § 13; N.H. CONST. pt. I, art. 23; OHIO CONST. art. II, § 28; TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16.

retroactivity has been judicially described as a “brief and inexplicable excursion from the long-standing norm.”¹⁶⁶

The Supreme Court cases that have been traditionally cited as justifying a presumption of retroactivity—*Schooner Peggy*, *Thorpe*, and *Bradley*—are in fact easily reconcilable with the presumption of prospectivity for substantive legislative changes. In *Schooner Peggy*, the Court applied a treaty to a case pending on appeal because the language of the treaty commanded such retroactivity.¹⁶⁷ In that case, the presumption of prospective application had been rebutted by clear legislative intent.¹⁶⁸ In *Thorpe*, retroactivity was justifiable because the change involved the imposition of a new notice and hearing requirement.¹⁶⁹ Prospective application was not warranted in *Thorpe* because the change fell within the exception for purely non-substantive, procedural alterations of existing law.¹⁷⁰ *Bradley* involved a statute that allowed a federal court to grant reasonable attorneys’ fees to prevailing parties in certain cases.¹⁷¹ Because applying the attorneys’ fees provisions would not result in manifest injustice and there was no congressional intent to the contrary, the *Bradley* Court held that the new attorney’s fee provision could be applied retroactively.¹⁷²

Even if *Schooner Peggy-Thorpe-Bradley* were not such tenuous precedent, a presumption of prospectivity should still have commanded the Court’s support simply because it is the “better rule.”¹⁷³ Presumptive prospectivity provides persons otherwise affected by new legislation with fixed, predictable standards at the time persons contemplate conduct,¹⁷⁴ which allows market actors to

166. *McLaughlin v. New York*, 784 F. Supp. 961, 971 (N.D.N.Y. 1992). *See also James v. American Int’l Recovery, Inc.*, 799 F. Supp. 1156, 1189 (N.D. Ga. 1992) (stating that *Bradley* represents an unprecedented departure).

167. *See Schooner Peggy*, 5 U.S. (1 Cranch) at 110.

168. *See id.*

169. *See Thorpe*, 393 U.S. at 282-83.

170. *See id.*

171. *See Bradley*, 416 U.S. at 710.

172. *See id.* at 711-21.

173. *See Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991).

174. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303-04 (1994); *Luddington*, 966 F.2d at 229.

make decisions with more complete information about applicable rules. Prospectivity is more fair because persons know before they act what the likely legal consequences of those actions will be, which allows them to avoid conduct that is unlawful.¹⁷⁵ A presumption *against* retroactivity better preserves the distinction between courts and legislatures: the former act retroactively, settling disputes between persons by application of pre-existing law; the latter act prospectively, setting the general rules of future conduct.¹⁷⁶

2. The *Landgraf* Rule

After *Landgraf*, a presumption of prospectivity applies for legislation affecting conduct or legal interests arising prior to the effective date of the new statute. The temporal event which controls the prospective application of the new law is private party conduct, which may have (but need not have) created a pre-enactment legal interest.¹⁷⁷ Prospectivity is not rebutted when the private party's prior interests are subject to the filing of a lawsuit, or the pendency of an appeal, at the time of the new law's adoption.¹⁷⁸ This rule of presumed prospectivity is triggered when four conditions are present.

First, the legislature must not have revealed its intent about whether the new statute is to apply retroactively or prospectively. When the legislature expresses a "clear intent" that the legislation is retroactive, the presumption is rebutted.¹⁷⁹ Although there is some

175. See *Baynes*, 976 F.2d at 1373; *Gersman*, 975 F.2d at 897; *Mozee*, 963 F.2d at 936; *Wright*, 913 F.2d at 1574; *Criger v. Becton*, 902 F.2d 1348, 1354 (8th Cir. 1990).

176. See *Hicks*, 982 F.2d at 298; *Simmons*, 931 F.2d at 1230; *American Int'l Recovery*, 799 F. Supp. at 1196.

177. See *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 527, 530 (5th Cir. 1995).

178. See *Rivers*, 511 U.S. at 311 (holding that the presumption applies even though an appeal was pending when statute became law); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 797 (8th Cir. 1993); *Mojica v. Gannett Co.*, 7 F.3d 552, 558 (7th Cir. 1993). Conversely, the *Landgraf* rule is not limited just to cases pending when the new law became effective. See *Ventre v. Johnson*, No. 93-2535, 39 F.3d 1179, 1994 WL 589618 (4th Cir. Oct. 28, 1994).

179. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, 280, 286 (1994); *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 12 (1st Cir. 1994) (stating that the presumption against retroactive statutes can be overcome when Congress intends for retroactivity); *Rebel Motor Freight, Inc. v. Freeman Drywall Co.*, 914 F. Supp. 1516, 1522 (W.D. Tenn. 1994); *Petropoulos v. Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511, 515 (S.D. Ohio 1993); *Vashon Island Comm.*

confusion about whether this first step can be satisfied by evidence of legislative intent other than an express statutory command,¹⁸⁰ the better rule is that the legislature manifests a clear intent only when the face of the statute "requires retroactivity,"¹⁸¹ or when the statute contains an "express command" that it be retroactive.¹⁸² If the statute is silent on the issue of retroactivity, and the legislative history is at all ambiguous, the presumption applies.¹⁸³ If the statute expressly requires prospectivity, the presumption is not necessary.¹⁸⁴

for *Self-Government v. Washington State Boundary Review Bd.*, 903 P.2d 953, 959 (Wash. 1995) (en banc) ("A statute may be applied retroactively if the Legislature intended such a result."). If the legislature intends for a provision of a law to apply to pending trials, then courts abide by this intent, especially if the law involves non-substantive changes. See *Ex parte Collett*, 337 U.S. 55, 71 (1949) (new rule defining forum *non conveniens*); *Sancho v. Texas Co.*, 308 U.S. 463, 467 (1940) (new method of enforcing awards).

180. Compare, e.g., *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996) (stating that presumption against retroactivity exists "unless the statute provides explicitly for retroactive application"), *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 538 (1st Cir. 1995) (requiring clear statutory language demanding retroactivity), and *Chenault v. United States Postal Serv.*, 37 F.3d 535, 537 (9th Cir. 1994) (same), with *Green v. Nottingham*, 90 F.3d 415, 419 (10th Cir. 1996) (considering both the language of the act and the legislative history in search of "unambiguous directive"), *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1270 (1st Cir. 1996) (holding that legislative history "left no doubt" that retroactivity was contemplated), and *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 212 (9th Cir. 1995) (considering legislative history for evidence of "clear congressional intent" to apply statute retroactively).

181. See *Landgraf*, 511 U.S. at 270, 272-73, 280; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect . . . unless the legislative purpose so to do plainly appears."); *Downer v. United States Dep't of Agric. & Soil Conservation Serv.*, 894 F. Supp. 1348, 1355 (D.S.D. 1995), *aff'd* 97 F.3d 999 (8th Cir. 1996).

182. See *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Hot, Sexy & Safer Prods.*, 68 F.3d at 538.

183. See *Sparks v. Craft*, 75 F.3d 257, 262 (6th Cir. 1996) (stating that when no evidence of whether the legislature intended any purpose that requires retroactive application, then prospectivity governs); *Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed. Cir. 1996); *Mathews v. Kidder, Peabody & Co.*, 947 F. Supp. 180, 186 (W.D. Pa. 1996); *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 109 (Fla. 1996).

184. See *Jeffries v. Wood*, 114 F.3d 1484, 1494-96 (9th Cir. 1997) (finding congressional intent that evidenced a wish that the statute apply prospectively); *Santa Fe Energy Prods. Co. v. McCutcheon*, 90 F.3d 409, 413 (10th Cir. 1996) (holding that royalty rules were intended to apply prospectively); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995) (stating that the ADA was not intended to be retroactive); *Oswald v. LaRoche Chems., Inc.*, 894 F. Supp. 988, 992 (E.D. La. 1995).

Second, the presumption only applies to substantive changes.¹⁸⁵ Changes characterized as procedural, jurisdictional, remedial, clarifying, or curative may be retroactive.¹⁸⁶ If the legislature seeks to avoid the presumption simply by labeling the change as non-substantive, a court may look behind the label to see if the change, in effect, imposes new penalties or damages liability for past private behavior. In such a case, prospectivity controls despite the legislature's attempt to characterize the statute as non-substantive.¹⁸⁷ The impact of such new penalty provisions on parties' existing rights may be particularly harsh and pronounced, therefore justifying application of the presumption.

Third, the presumption has greatest applicability to statutes which would, but for the presumption, be secondarily retroactive—they would alter the future legal consequences of past private action, particularly where retroactive application would otherwise impose an unanticipated liability.¹⁸⁸ The presumption is typically not needed to

185. See *Landgraf*, 511 U.S. at 278; *United States v. Bacon*, 82 F.3d 822, 824 (9th Cir. 1996) (stating that statute that affects a right to bring an action in court is substantive); *Hyatt v. Northrop Corp.*, 80 F.3d 1425, 1430-31 (9th Cir. 1996) (holding that a statute that defined additional conduct as unlawful was substantive); *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 527 (5th Cir. 1995) (stating that the determination of when a cause of action accrues is substantive); *Caddell*, 96 F.3d at 1371 (stating that substantive change triggers the presumption if law attaches new legal consequences to events completed before its enactment).

186. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997) (limiting the definition of "jurisdictional" to statutes affecting where a suit may be brought, not whether it may be brought at all); *Landgraf*, 511 U.S. at 274-80, 285 n.37; *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969) (procedural); *Hunter v. United States*, 101 F.3d 1565, 1572-73 (11th Cir. 1996) (procedural); *Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (jurisdictional); *Williams v. Stegall*, 945 F. Supp. 145, 147-48 (E.D. Mich. 1996) (jurisdictional); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F. Supp. 1349, 1356-57 (N.D. Cal. 1995) (jurisdictional); *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974) (remedial); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312 n.8 (1945) (remedial); *Bayless v. Community College Dist. No. XIX*, 927 P.2d 254, 257 (Wash. Ct. App. 1996) (remedial); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 379 (1940) (curative); *United States v. Heinszen & Co.*, 206 U.S. 370, 385-86 (1907) (curative).

187. See *Landgraf*, 511 U.S. at 280-86; *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 212 (9th Cir. 1995); *State Farm Mut. Auto. Ins. Co. v. LaForet*, 658 So. 2d 55, 61 (Fla. 1995).

188. See, e.g., *Brown v. Secretary of the Army*, 78 F.3d 645, 654 (D.C. Cir. 1996) (applying the presumption to statute waiving sovereign immunity, where retroactivity would impose on the United States a liability to which it has not explicitly consented).

overcome primary retroactivity, because legislation which alters the past legal consequences of past private action is usually impermissible regardless of legislative intent.¹⁸⁹

Fourth, the presumption of prospectivity is not needed simply because the new statute draws upon antecedent facts for its operation,¹⁹⁰ is applied in a case arising from pre-enactment conduct,¹⁹¹ or upsets expectations based in prior law.¹⁹² These kinds of changes do not operate with what will be termed "true retroactivity."¹⁹³ Indeed, when the precipitating event for a statute's application occurs after the effective date of the statute, the statute is often deemed to apply prospectively, even though the precipitating event had its origin in a factual context existing prior to the statute's enactment.¹⁹⁴

A statute has a *truly retroactive* effect sufficient to trigger the presumption when it satisfies both (1) the *Landgraf* definition of

189. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1456 (1995) (invalidating a statute that "prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislature occurred" despite clear expression of legislative intent); *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 705 (R.I. 1993). See also *supra* notes 128-29 and accompanying text.

190. See *Reynolds v. United States*, 292 U.S. 443, 449 (1934); *Cox v. Hart*, 260 U.S. 427, 435 (1922); *In re Estate of Ryan*, 928 P.2d 735, 737 (Ariz. Ct. App. 1996).

191. See *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 99-102 (1992) (Thomas, J., concurring in part).

192. See *Landgraf*, 511 U.S. at 269; *Lieberman-Sack v. Harvard Community Health Plan of New England, Inc.*, 882 F. Supp. 249, 255 (D.R.I. 1995) (stating that the fact that legislation changes expectations about the extent of liability is an insufficient basis to strike the law as impermissibly retroactive).

193. A true retroactive effect is what the *Landgraf* opinion referred to as a "truly 'retrospective' application of a statute." *Landgraf*, 511 U.S. at 279-80 (using the *Wheeler* test for ascertaining if a law is retroactive). See also *Hunter v. United States*, 101 F.3d 1565, 1570-72 (11th Cir. 1996); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 813-14 (9th Cir. 1995); *Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1388 (11th Cir. 1994); *Hook v. Ernst & Young*, 28 F.3d 366, 373 (3d Cir. 1994); *Templeton Coal Co. v. Shalala*, 882 F. Supp. 799, 813 (S.D. Ind. 1995); *Gilbert v. Milliken & Co.*, 836 F. Supp. 856, 858 (N.D. Ga. 1992); *Kluever v. Weatherford Hosp. Auth.*, 859 P.2d 1081, 1083 (Okla. 1993); *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988).

194. See, e.g., *Blue Cross & Blue Shield of Kansas City v. Bell*, 798 F.2d 1331, 1337 (10th Cir. 1986) (stating that where statute applies to contracts issued or renewed after the effective date of the statute, the statute is not retroactive, even though the original contract may pre-date the statute); *Golden Rule Ins. Co. v. Stephens*, 912 F. Supp. 261, 266 (E.D. Ky. 1995) (same); *In re Estate of Burns*, 904 P.2d 301, 303-04 (Wash. Ct. App. 1995).

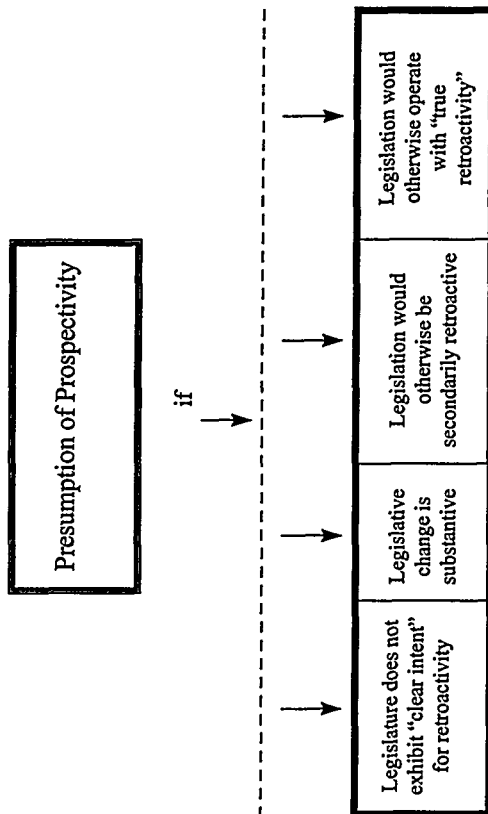
secondary retroactivity, and (2) the *Wheeler* definition of retroactivity. The *Landgraf* definition of secondary retroactivity is met and a law exhibits “true retroactivity,” only when legislation attaches a new legal consequence to a pre-enactment event. Removal of discretionary power to relieve a person from a burden imposed by pre-enactment conduct is not a new legal consequence.¹⁹⁵ Under the *Wheeler* definition, readopted in *Landgraf*, a new statute is truly retroactive if it takes away or impairs vested rights acquired under existing laws, creates a new obligation or imposes a new duty, or attaches liability for past conduct.¹⁹⁶ (The substantive content of these definitional conditions to true retroactivity will be fully explored in Part V). Secondly retroactive statutes which have these consequences operate with true retroactivity, and therefore, they are subject to the presumption of prospectivity, unless a contrary legislative intent is evident.

These four conditions to a successful invocation of the presumption of prospectivity are summarized below in Figure 3.

195 See *Hunter*, 101 F.3d at 1570-1572 (holding that amended statute governing appeals in pending habeas corpus and post-conviction relief proceedings applied to habeas cases is not a change that applies with true retroactivity because it does not increase a party's liability for past conduct, or impose new duties with respect to past transactions); *Drinkard v. Johnson*, 97 F.3d 751, 766 (5th Cir. 1996) (holding that new standards of review for habeas applicant not truly retroactive because they do not increase liability for past conduct); *Samaniego-Meraz v. INS*, 53 F.3d 254, 256 (9th Cir. 1995) (holding that repeal of discretionary relief from deportation is not a retroactive act).

196. In *Hughes Aircraft Co. v. United States ex rel. Schumert*, the Court noted that the *Wheeler* definition described a “sufficient, rather than a necessary, condition” for invoking the presumption against retroactivity. 117 S. Ct. 1871, 1876 (1997) (emphasis in original). Most courts, including *Hughes Aircraft*, still rely on *Wheeler*. See *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207, 210 (9th Cir. 1995) (stating that presumption applies when new statute “significantly increases liability”); *Circuit City Stores, Inc. v. Officemax, Inc.*, 949 F. Supp. 409 (E.D. Va. 1996) (holding that the Federal Trademark Dilution Act may not be applied retroactively because it imposes new duties); *Mathews v. Kidder, Peabody & Co., Inc.* 947 F. Supp. 180, 186 (W.D. Pa. 1996) (stating that a federal law might impair rights possessed by private parties before law enacted, therefore presumption of prospectivity applies to prevent law from having true retroactive effect); *FDIC v. Hinch*, 879 F. Supp. 1099, 1104 (N.D. Okla. 1995) (stating that the presumption applies if the effect of new statute is to increase liability).

FIGURE 3



B. The Modern Era Definition of Retroactivity

1. Conflicting Roles of a Finding of Retroactivity

For many years there has been dispute over the function of the term “retroactive.” On the one hand, most commentators and some courts believed that a finding that a law was retroactive to was merely

descriptive of the operation of the law,¹⁹⁷ and only the beginning point of analysis. If a law was deemed retroactive, this finding was not dispositive of the law's validity; there were other issues that still needed to be addressed (e.g., the nature of the retroactive impact on the private party) before one could decide whether the retroactivity was sufficient to void the law.¹⁹⁸ Under this view, it was important to define whether a law was retroactive, because satisfaction of that definition then sets in motion a series of subsequent inquiries about the law's ultimate validity. If the law was not found to be retroactive, then additional steps are not necessary.

On the other hand, many courts assumed that finding a law to be "retroactive" was not the beginning, but rather the end of a process of analysis. For these courts, a finding that a law was retroactive was tantamount to a finding that the law was unconstitutional or otherwise impermissible.¹⁹⁹ If these courts believed the challenged law should not be declared void, they had to conclude that the law was not retroactive. Courts defined the term "retroactivity" narrowly so that it would not encompass the law under attack.

197. See, e.g., Hochman, *supra* note 5, at 692:

A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retroactive statute is one which reaches back to attach new legal rights and duties to already completed transactions. However, a statute may be retro[active] . . . which declares preexisting obligations unenforceable in the future.

Id. See *Miller v. Florida*, 482 U.S. 423, 430 (1987).

See *Slawson*, *supra* note 5, at 217-18 ("[Retroactivity refers either to] laws that make rights or duties depend on past events in the narrow sense of dependence on events that have occurred and terminated before the laws were enacted," or "[to] an effect which occurs when a new law is imposed on society [which] substantially . . . disturb[s] patterns of conduct that represent substantial investments in labor or property"); *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); see also *Munzer*, *supra* note 5, at 426 ("[R]etroactive legislation . . . consists of laws that [(1)] alter the legal status, that is, the legal character or consequences, of some pre-enactment action or event, [(2)] make a legal judgment regarding that action easier or harder to obtain, [or (3)] substantially affect expectations stemming from that action.").

198. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (stating that retroactive legislation requires a greater justification than prospective legislation to satisfy due process); *Kuhn v. State*, 924 P.2d 1053, 1056-57 (Colo. 1996) (stating that a retroactive statute is not necessarily unconstitutional).

199. See *Liberty Mut. Ins. Co. v. Paper Mfg. Co.*, 753 F. Supp. 156, 158 (E.D. Pa. 1990).

Courts commonly relied on three definitions of retroactivity. First, legislation was not “retroactive” merely because it applied to conduct antedating the legislation’s enactment.²⁰⁰ Second, legislation was not retroactive just because it imposed a new duty or liability on past acts.²⁰¹ Third, regulation of future action based upon rights previously acquired by the person regulated was not retroactive.²⁰²

This approach to retroactivity has several faults. First, it is conclusory. Simply terming the future operation of backwards-looking law “non-retroactive” has allowed courts to validate laws without having to explain why it was not somehow unfair for the law’s operation to rely on pre-enactment facts. Also, the three definitions of retroactivity have not been routinely adopted by all courts. While some jurisdictions have refused to call legislation retroactive if the new statute either imposed new duties on past acts or regulated future actions based on legal rights previously acquired,²⁰³ other jurisdictions have deemed laws to be impermissibly retroactive if the new statute imposed a new duty with respect to past transactions,²⁰⁴ impaired legal rights vested under existing laws,²⁰⁵ or applied a penalty to a prior completed act.²⁰⁶

200. See *Miller v. Florida*, 482 U.S. at 431-33; *Cox v. Hart*, 260 U.S. 427, 435 (1922); *Campos v. INS*, 16 F.3d 118, 122 (6th Cir. 1994); *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993); *FDIC v. Faulkner*, 991 F.2d 262, 266 (5th Cir. 1993); *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 16 (1st Cir. 1993); *Administrators of the Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993); *Gonsalves v. Flynn*, 981 F.2d 45, 48-49 (1st Cir. 1992); *Delaware Coca-Cola Bottling Co. v. S & W Petroleum Serv. Inc.*, 894 F. Supp. 862, 865 (M.D. Pa. 1995); *Centigram Communications Corp. v. Lehman*, 862 F. Supp. 113, 119 (E.D. Va. 1994); *Howell v. Heim*, 882 P.2d 541, 547 (N.M. 1994); *Burger v. Unemployment Compensation Bd. of Review*, 77 A.2d 737, 739 (Pa. Super. Ct. 1951); *Cook v. Wyoming Oil & Gas Conservation Comm’n*, 880 P.2d 583, 585-86 (Wyo. 1994).

201. See *Concrete Pipe*, 508 U.S. at 637; *In re Chateaugay Corp.*, 53 F.3d 478, 489-91 (2d Cir. 1995); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986).

202. See *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *Reynolds v. United States*, 292 U.S. 443, 449 (1934); *Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574, 584 (S.D. Cal. 1993).

Post-*Landgraf*, some courts found backwards-applying legislation to be non-retroactive if it did not bring about any substantive changes. See, e.g., *Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1388 (11th Cir. 1994).

203. See *supra* notes 200-02.

204. See, e.g., *Kuhn v. State*, 924 P.2d 1053, 1057 (Colo. 1996); *Colorado Office of*

2. A New Model of Retroactivity

A better approach is one that makes a finding of retroactivity neither the beginning nor the end of the analysis. Rather, there may be as many as four decision points in an analytical process which call for differing inquiries about the retroactivity issue. At each point a slightly different definition of retroactivity is employed.

The first inquiry is whether the new statute has prospective or retroactive effect. If the statute alters the legal consequences of past (pre-enactment) private action, it has retroactive effect. If it affects private interests and private conduct arising only post-enactment, it has only prospective effect.²⁰⁷

If it does have retroactive effect, the second step is to ask whether the statute alters the legal consequences of private action in the past (pre-enactment), or in the future (post-enactment). If the former, then the law is an example of primary retroactivity. The Supreme Court refers to statutes that operate with primary retroactivity as “statutes . . . enacted to take effect from a time anterior to their passage,”²⁰⁸ and “legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred.”²⁰⁹ As noted in Part III, if the retroactivity is primary, the

Consumer Counsel v. Public Serv. Co. of Colorado, 877 P.2d 867, 870 (Colo. 1994); *Karl v. Bryant Air Conditioning Co.*, 331 N.W.2d 456, 463 (Mich. 1982).

205. See, e.g., *United States v. Security Indus. Bank*, 459 U.S. 70, 80-82 (1982); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897-98 (6th Cir. 1991); *DeCarion v. Monroe County*, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994); cf. *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (finding a statute to be non-retrospective because “it took away no vested right”).

206. See, e.g., *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (holding that new punitive damages provisions as punishment constitute a new right or entitlement for a plaintiff and cannot be applied retroactively).

207. See, e.g., *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1067 (9th Cir. 1997); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814-15 (9th Cir. 1995).

208. *Landgraf*, 511 U.S. at 268 (explaining that retroactivity encompasses more than just primary retroactivity) (quoting *Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156)).

209. *Plaut*, 115 S. Ct. at 1456 (identifying clearly retroactive legislation) (emphasis in original).

analysis usually ends here because the primary retroactivity itself invalidates the statute.²¹⁰

If the statute alters only the future legal consequences of past private action, then it is an example of secondary retroactivity. The *Wheeler* court referred to secondary retroactivity when it permitted the invalidation of statutes which, "though operating only from [their] passage, affect [past] rights and transactions."²¹¹ One-hundred-and-eighty years after *Wheeler*, *Landgraf* readopted this definition when it stated that courts "must ask whether the new provision attaches new legal consequences to events completed before its enactment."²¹² Lower courts concur. While a statute is not retroactive merely because it draws upon antecedent facts, it is retroactive if it affects pre-existing rights and legal duties of individuals subject to the statute.²¹³

If a statute operates in a secondarily retroactive fashion, the next (and third) inquiry is whether "clear" legislative intent requires this result.²¹⁴ When legislative intent is ambiguous, the presumption of prospectivity becomes relevant. The presumption is applicable only when the statute is truly retroactive. A statute manifests true retroactivity when it satisfies the *Wheeler-Landgraf* definition of secondary retroactivity—the statute impairs existing vested rights, creates or imposes a new duty, or attaches or increases liability for past conduct.²¹⁵ A statute is not considered "truly retroactive" if the

210. See *supra* notes 128-29 and accompanying text.

211. *Wheeler*, 22 F. Cas. at 767.

212. *Landgraf*, 511 U.S. at 269-70. *Wheeler's* definition of retroactivity is a sufficient, but not a necessary, condition for invoking the presumption against retroactivity. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1876 (1997).

213. See *Lennox v. Evans*, 87 F.3d 431, 432 (10th Cir. 1996); *Porter v. Galarneau*, 911 P.2d 1143, 1150 (Mont. 1996); *Gadsden Fed'n of Teachers v. Board of Educ. of Gadsden Indep. Sch. Dist.*, 920 P.2d 1052, 1057 (N.M. Ct. App. 1996).

214. See *supra* notes 179-84 and accompanying text.

215. See *supra* notes 190-95 and accompanying text. See also *Hunter v. United States*, 101 F.3d 1565, 1572 (11th Cir. 1996) ("[T]he term 'rights' [for retroactivity analysis] should not be construed broadly so as to sweep within its ambit mere expectation interests under procedural or remedy rules."); *Sechrest v. Ignacio*, 943 F. Supp. 1253, 1255 (D. Nev. 1996) (stating that a statute is retroactive only if its application to a pending case would impair rights an individual already possessed or increase an individual's liability for past conduct, or would impose new duties with respect to past actions); *Delaware Coca-Cola Bottling Co. v. S & W Petroleum*

its only retroactive effect is to upset the expectations of private parties. True retroactivity is present, and the presumption is triggered, only when (1) legislative intent to proceed retroactively is unclear, and (2) the statute satisfies the *Wheeler-Landgraf* definition of secondary retroactivity.

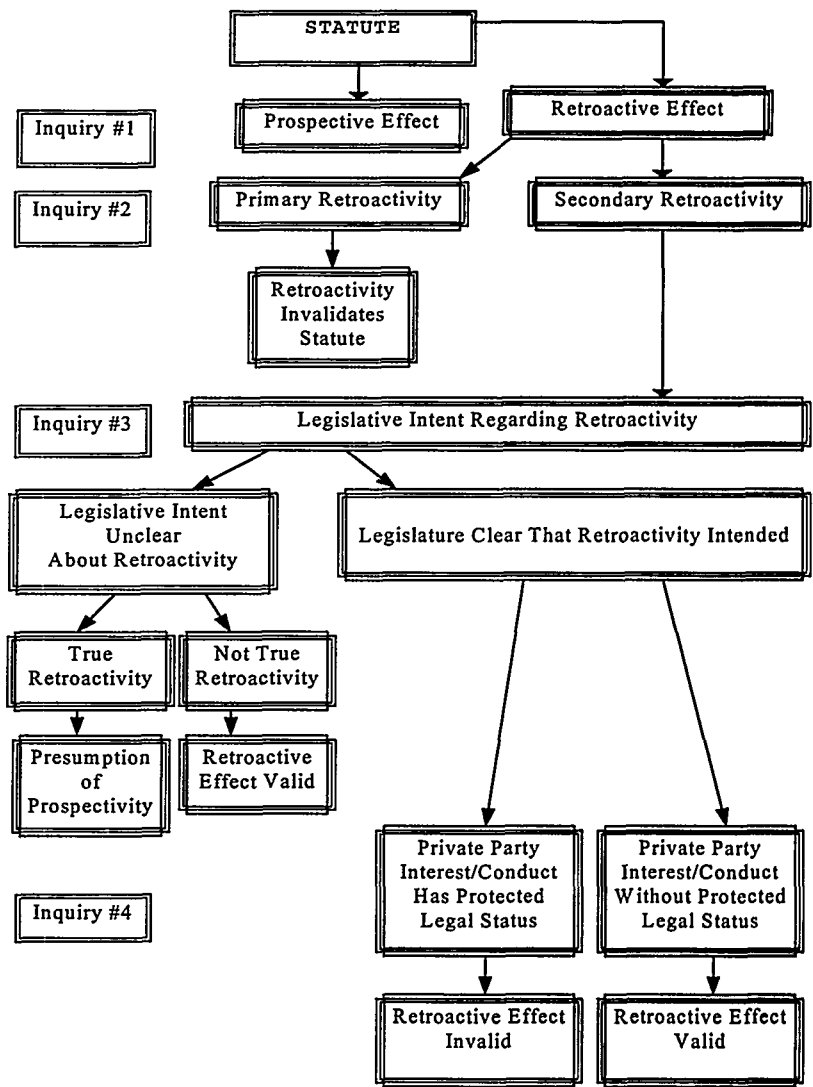
When the presumption of prospectivity is inapplicable because the legislature intends for the statute to be secondarily retroactive, the fourth and final relevant inquiry is not whether the statute applies retroactively (it does), but whether the retroactivity is permissible. This inquiry requires a determination of whether the pre-enactment private conduct or private interest has protected legal status with respect to the new statute. If it does not, and if the legislature calls for retroactivity, then the statute may alter the future, post-enactment legal consequences of the past private action. If the conduct or interest does have protected legal status, then secondary retroactivity is forbidden, regardless of legislative wishes.²¹⁶

This sequence of analysis, which requires up to four definitional decision points, is illustrated in Figure 4.

Serv., Inc., 894 F. Supp. 862, 865 (M.D. Pa. 1995) ("A law is given retroactive effect when it is used to impose a new legal burden on a past transaction or occurrence."); *Doe v. Abbott Lab.*, 892 F. Supp. 811, 814 (E.D. La. 1995) (stating that a law is retroactive when it imposes an important new legal burden on pre-enactment events).

216. See, e.g., *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 530-31 (5th Cir. 1995) (stating that once a party's cause of action accrues, it becomes a vested right that may not be retroactively divested regardless of legislative wishes).

FIGURE 4



V. DEFEATING INTENTIONAL SECONDARY RETROACTIVITY: THE CONDITIONS TO PROTECTED LEGAL STATUS

A. *The Elements of Protected Legal Status*

1. *Landgraf* Considerations

When a private party's pre-enactment conduct has protected legal status, even a law which is intended by the legislature to be secondarily retroactive may not operate to adversely affect these earlier private actions.²¹⁷ Whether private actions have protected legal status with respect to laws intended to be secondarily retroactive depends on what the *Landgraf* Court calls a "process of judgment" that considers three factors: (1) the "nature" of the change in the law; (2) the "extent" of the change in the law; and (3) "the degree of connection between the operation of the new rule and a relevant past event."²¹⁸ While the primary function of these three factors is to determine (in conjunction with the *Wheeler* definition of retroactivity) whether a statute operates with "true retroactivity," they also control whether pre-enactment conduct has achieved protected legal status. If so, the conduct is immunized from retroactivity even when the legislature expressly intends for the legislation to be retroactive.

The first consideration—"the nature of the change in the law"—focuses on the nature of the legal interest affected by the change. Protected legal status tends to be conferred on an existing legal interest either determined to be a "vested right" that would otherwise be impaired by the new law,²¹⁹ or a contract right specially protected

217. See *Maitland v. University of Minnesota*, 43 F.3d 357, 361 (8th Cir. 1994) (stating that if a statute reveals Congress' intent that it is to be retroactive, that intent governs unless such an application would violate the Constitution); *Arlidge v. Holnam, Inc.*, 957 F. Supp. 822, 828 (M.D. La. 1996) ("Even if the legislature made the law retroactive, such an effect must be constitutional."); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) ("Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply the statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.").

218. *Landgraf*, 511 U.S. at 270.

219. See, e.g., *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 500-01 (Kan. 1995);

against the change by the Contracts Clause.²²⁰ The *Landgraf* Court concurs. *Landgraf* adopts that portion of the *Wheeler* test that finds laws retroactive (often impermissibly so) if they “impair vested rights acquired under existing laws.”²²¹ The opinion also notes that “new provisions affecting contractual or property rights [are] matters in which predictability and stability are of prime importance,”²²² and that the Contracts Clause “prohibits states from passing . . . retroactive . . . laws ‘impairing the Obligation of Contracts.’”²²³

The second consideration—“the extent of the change in the law”—requires reviewing courts to take into account the degree and kind of impact the changed law has on existing rights.²²⁴ Protected legal status is most often afforded to property holders where the extent of change causes property either to be (1) unconstitutionally “taken” without just compensation,²²⁵ or (2) subject to certain kinds of new duties or liabilities with respect to past events.²²⁶ The

Steinfeld v. Nielsen, 139 P. 879, 896 (Ariz. 1913); Hansen Bros. Enters. v. Board of Supervisors of Nevada County, 907 P.2d 1324, 1344 (Cal. 1996) (remanding to determine extent of company’s vested rights to mine and quarry its property).

220. See, e.g., Educational Employees Credit Union v. Mutual Guar. Corp., 50 F.3d 1432, 1438-39 (8th Cir. 1995); *In re Workers’ Compensation Refund W. Nat’l Mut. Ins. Co.*, 46 F.3d 813, 821 (8th Cir. 1995); Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 385 (8th Cir. 1994). A contract is often seen as a vested right. See Spradling v. Colorado Dep’t of Revenue, 870 P.2d 521, 523 (Colo. Ct. App. 1993).

221. *Landgraf*, 511 U.S. at 269 (quoting *Wheeler*, 22 F. Cas. at 757). The Court characterizes the Takings Clause as a constitutional protection against legislative attempts to deprive private persons of “vested property rights.” See *id.* at 266. In his concurring opinion, Justice Scalia’s criticizes the majority opinion’s “vested right focus.” See *id.* at 290-93.

222. *Id.* at 271.

223. *Id.* at 266.

224. The extent of the new liability imposed on pre-enactment conduct was a primary reason why the *Landgraf* Court refused to apply the 1991 Amendments to the Civil Rights Act retroactively. See *Landgraf*, 511 U.S. at 283-84.

225. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loveladies Harbor, Inc. v. United States 28 F.3d 1171 (Fed. Cir. 1994); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

226. See, e.g., Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 (1994) (holding that section 101 of the 1991 Civil Rights Act cannot be retroactive because it imposes “important new legal obligations” on employers for past acts); Davon, Inc. v. Shalala, 75 F.3d 1114, 1122 (7th Cir. 1996) (stating that a statute is retroactive which attaches new legal consequences, in the form of new mandatory payments to a fund, for the act of engaging in some pre-enactment conduct); Nickeo v. Virgin Islands Tel. Corp., 42 F.3d 804, 806-07 (3d Cir. 1994) (holding that the Civil Rights Act of 1991 cannot apply retroactively to cases pending at time of enactment of

Landgraf Court specifically notes that the antiretroactivity principle is particularly strong with respect to “new provisions affecting . . . property rights,”²²⁷ and that it is the “Takings Clause [which] prevents the Legislature (and other government actors) from depriving private persons of vested property rights.”²²⁸ With respect to the imposition of new duties or liabilities, both *Landgraf* and its companion case, *Rivers*,²²⁹ concluded that the provisions of the 1991 Civil Rights Act under review should be prospective, in large part because these new provisions substantially increase a party’s liability in the civil context.²³⁰

The third consideration—“the degree of connection between the operation of the new rule and a relevant past event”—is really an inquiry about the essential fairness of a secondarily retroactive law. Private property right-holders have protected legal status with respect to a new retroactive law if it would be fundamentally “unfair” to apply the law so as to affect their existing rights.²³¹ Such fundamental unfairness is present when secondary retroactivity would be either inconsistent with due process,²³² or barred by an assertion of

the Act, when to do so would increase liability); *P-W Invs., Inc. v. City of Westminster*, 655 P.2d 1365, 1371 (Colo. 1982) (stating that new law cannot take away vested rights, or create new obligations or attach a new disability in respect to past transactions); *Saint Vincent Hosp. & Health Ctr., Inc. v. Blue Cross & Blue Shield of Montana*, 862 P.2d 6, 9 (Mont. 1993) (invalidating law if it impairs vested right or creates new obligation with respect to past transactions); *OSI Indus., Inc. v. Utah State Tax Comm’n*, 860 P.2d 381, 383 (Utah Ct. App. 1993) (“[A] later statute or amendment should not be applied retroactively so as to deprive a party of its rights or impose greater liability . . .”).

227. *Landgraf*, 511 U.S. at 271.

228. *Id.* at 266. See also *Plaut*, 115 S. Ct. at 1462 (stating that the Takings Clause invalidates laws that abrogate vested property interests) (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)).

229. See *Rivers*, 511 U.S. at 298 (considering whether section 101 of the 1991 Civil Rights Act should apply retroactively to pre-enactment conduct).

230. See *Landgraf*, 511 U.S. at 281-84; *Rivers*, 511 U.S. at 304.

231. See *Landgraf*, 511 U.S. at 265 & n.18 (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence. . . . Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . .”).

232. See, e.g., *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995); *National Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994).

equitable estoppel.²³³ *Landgraf* notes that the “Due Process Clause . . . protects the interests . . . that may be compromised by retroactive legislation.”²³⁴ The *Landgraf* opinion also recognizes that it may be unfair for new laws to thwart legitimate expectations, arising from a reasonable reliance on prior law.²³⁵ These are elements traditionally associated with the doctrine of equitable estoppel.²³⁶

2. The Factual Components of Protected Legal Status

The presence or absence of protected legal status is highly fact-specific. The example set out earlier in Part II²³⁷ helps to demonstrate the fact-driven nature of protected legal status, and to explain when the above defenses to secondary retroactivity become applicable. It was assumed that a legislative body, the Board of County Commissioners, had initially zoned a parcel of land with a one-half acre minimum lot size requirement in 1960. In 1997, the Board rezoned the parcel, so there is now a two-acre minimum lot size requirement. Between 1960 and 1997, a land developer may have taken action that causes it to have protected legal status with respect to the 1997 rezoning.

If the “nature” of the rezoning is to alter either a “vested right,” or a contract protected by the Contracts Clause, the developer may be able to escape retroactive application of the 1997 rezoning. For example, if the developer had purchased the six-acre parcel before 1997, and if the county had officially platted the parcel for twelve lots prior to 1997, the developer may have a vested right in post-1997 continuation of the one-half acre minimum lot size rule.²³⁸ On the

233. See, e.g., *Simons v. City of Portland*, 887 P.2d 824, 830-831 (Or. Ct. App. 1994).

234. *Landgraf*, 511 U.S. at 266. *Landgraf* also states that “a justification sufficient to validate a statute’s prospective application under the [Due Process] Clause ‘may not suffice’ to warrant its retroactive application.” *Id.*

235. See *id.* at 265, 270.

236. See *SIEMON*, *supra* note 16, at 13.

237. See *supra* Part II.A.

238. Compare *Schenck v. City of Hudson Village*, 937 F. Supp. 679, 689-91 (N.D. Ohio 1996) (holding that approval of preliminary plat accorded same status as final plat approval for due process purposes), and *Friends of the Law v. King County*, 869 P.2d 1056 (Wash. 1994) (en banc) (holding that approval of preliminary plat created a vested right), with *L.M. Everhart*

other hand, if the developer had only signed sales contracts with twelve private purchasers prior to 1997, the rezoning (permitting only three homes on the six acres) would probably be able to interfere with these private contracts.²³⁹ The government action in platting might confer upon the developer a right that vests in the developer, and thus an ability to resist retroactive changes imposed by that government.

Assume instead that prior to 1997, the county had signed an agreement with the developer permitting the construction of twelve homes on the six acres once the developer paid \$1 million to the county in impact fees. If the developer had paid the \$1 million to the county, the 1997 rezoning could then be viewed as the county reneging on its own contract with the developer. The developer might then have protected legal status under the Contracts Clause with respect to the 1997 zoning change.²⁴⁰

If the "extent" of the rezoning is either to "take" an existing property right without compensation, or impose a particular new duty or liability on past transactions, the developer may similarly have protected legal status with respect to the 1997 rezoning. If, prior to

Constr. v. Jefferson County Planning Comm'n, 2 F.3d 48, 52-53 (4th Cir. 1993) (holding that approval of subdivision plat does not create vested right). *See generally* *Acierno v. Cloutier*, 40 F.3d 597, 618-19 (3d Cir. 1994) (discussing different rules for vested rights in real property); *Todd v. Morgan*, 109 S.E.2d 803, 804-05 (Ga. 1959) (discussing vested rights under deeds to secure debts); *Elliot v. Kesler*, 799 S.W.2d 97, 102 (Mo. Ct. App. 1990) (discussing vested rights in rules of law); *Burrage v. New Hampshire Police Standards & Training Council*, 506 A.2d 342, 344 (N.H. 1986) (discussing vested rights in employment).

239. *See* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504-05 (1987) (considering contract impairment but unless a state actor is itself a contracting party courts should defer to legislative judgment as to the necessity and reasonableness of a measure retroactively impairing private contracts); *Mello v. Woodhouse*, 872 P.2d 337 (Nev. 1994) (discussing when rights in a contract vest).

240. *See* *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity [with regards to a state's modification of its obligations under a contract] is not appropriate because the State's self-interest is at stake."); *Parker v. Wakelin*, 937 F. Supp. 46, 57 (D. Me. 1996) (holding that a law that retroactively impairs public contract violates Contracts Clause); *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 607 (S.D. Iowa 1993) (holding that a retroactive statute impairing license agreements violates Contracts Clause); *Rothermel v. Florida Parole & Probation Comm'n*, 441 So. 2d 663, 664 (Fla. Dist. Ct. App. 1983) (stating that statutes which alter contractual rights are within a general rule against retrospective application); *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 869-70 (R.I. 1987) (stating that a legislature may enact retrospective legislation if it does not impair contractual obligations).

1997, the county had approved the developer's plan to build twelve homes on the six acres, and if the developer had then expended a great deal of money to begin the project, application of the 1997 rezoning change to the six acres might be a taking of the developer's property.²⁴¹ The likelihood that the developer would have protected legal status because of the Takings Clause would be even greater if the developer could prove that application of the 1997 change would deny the developer economically viable use of the six acres,²⁴² or interfere with the developer's reasonable investment-backed expectations.²⁴³

The developer might also have protected legal status if the developer had built twelve homes prior to 1997 and the 1997 change required the developer to pay the county \$1 million in impact fees. These fees might be charged so that the county could buy open space elsewhere in the county to compensate for the open space lost when the developer built twelve homes, instead of the three that would have been permitted after 1997. The exaction of the impact fees might trigger the Takings Clause.²⁴⁴ Such a requirement would "create new obligations" based on past transactions and possibly

241. See, e.g., *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1546, 1549-50 (11th Cir. 1994) (stating that a change in development project's completion date constituted a taking); *A.A. Profiles, Inc., v. City of Ft. Lauderdale*, 850 F.2d 1483, 1487-88 (11th Cir. 1988) (holding that rezoning ordinance constituted a taking); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100-01 (5th Cir. Unit B Dec. 1981) (finding that ordinance which prevented plaintiff's from using their building permit constituted a taking).

242. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (holding that an owner who is deprived of all economically beneficial use of land is entitled to compensation); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (holding that the denial of economically viable use of property as a result of regulation constitutes a taking); *Creekside Assocs., Inc. v. City of Wood Dale*, 684 F. Supp. 201, 205 (N.D. Ill. 1988) (stating that a taking occurs when legislation deprives the owner of all or an essential use of his property).

243. See *Bowles v. United States*, 31 Fed. Cl. 37, 46 (Fed. Cl. 1994).

244. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319-20 (1994) (requiring property dedication as a permit condition satisfies takings analysis); *City of Portsmouth v. Schlesinger*, 46 F.3d 133, 137 (1st Cir. 1995) (subjecting the amount of money necessary to compensate city for impact of increased density to takings analysis); *Ehrlich v. City of Culver City*, 911 P.2d 429, 443-44 (Cal. 1996) (holding that takings analysis is applicable to monetary exactions).

make the “extent” of the developer’s retroactive liability sufficient to deserve protected legal status.²⁴⁵

Finally, the developer has protected legal status when there is an inadequate “degree of connection between operation of the new [1997] rule and a relevant past event.”²⁴⁶ If so, it could be unfair to apply the 1997 change to pre-enactment conduct by the developer. Such unfairness is present when secondary retroactivity would either violate the Due Process Clause, or permit the developer to raise equitable estoppel against the county. The developer might be able to raise a successful due process challenge if it can be shown that the new two-acre minimum lot size rule either is completely irrational, and accomplishes no legitimate goal,²⁴⁷ or deprives the developer of a vested right.²⁴⁸ The developer could raise equitable estoppel if the county had earlier made assurances that twelve homes could be built on the six acres, and if the developer had detrimentally relied on these assurances prior to 1997.²⁴⁹

245. See *Landgraf*, 511 U.S. at 283-84 (stating that the “extent” of a party’s retroactive liability is an important legal consequence to be considered in determining whether to permit secondary retroactivity); *Hook v. Ernst & Young*, 28 F.3d 366, 372-73 (3d Cir. 1994) (stating that previously lawful conduct which is rendered unlawful by subsequent amendment is protected from retroactive application); *Edwards v. Edwards*, 863 P.2d 513, 516 (Or. Ct. App. 1993) (stating that retroactive application would create new obligations). See also *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925) (stating that retroactive application of statute of limitations extension would violate due process).

246. See *supra* note 218 and accompanying text.

247. See *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993); *Schenck v. City of Hudson Village*, 937 F. Supp. 679, 690-91 (N.D. Ohio 1996).

248. See *Caritas Servs., Inc. v. Department of Soc. & Health Servs.*, 869 P.2d 28, 41 (Wash. 1994) (en banc) (“Due process is violated if the retroactive application of a statute deprives an individual of a vested right.”).

249. See *Lincoln Gen. Hosp. v. Blue Cross/Blue Shield of Nebraska*, 963 F.2d 1136, 1141 (8th Cir. 1992) (finding equitable estoppel from mailing insurance identification card); *Portmann v. United States*, 674 F.2d 1155, 1167 (7th Cir. 1982) (noting that one of the factors for equitable estoppel is reasonable reliance); *Bourne v. Tahoe Reg’l Planning Agency*, 829 F. Supp. 1203, 1208-09 (D. Nev. 1993) (stating that developer’s reliance on assurances of permit by regional development agency raised valid issue of estoppel); *Mortvedt v. Department of Natural Resources*, 858 P.2d 1140, 1143-1144 (Alaska 1993); *State ex rel. Department of Revenue v. Driggs*, 873 P.2d 1311, 1313 (Ariz. T.C. 1994) (finding reliance on forms and instructions disseminated by the Department); *Grand Haven Township v. Brummel*, 274 N.W.2d 814, 816 (Mich. Ct. App. 1978) (refusing to enforce injunction to follow zoning regulations on equitable grounds). But see *S & M Inv. v. Tahoe Reg’l Planning Agency*, 911

B. Functional Preconditions to Protected Legal Status

There are six constitutional and equitable defenses to intentional secondary retroactivity: (1) the Contracts Clause, (2) the vested rights doctrine, (3) the Takings Clause, (4) restrictions on new duties or liabilities imposed on past transactions, (5) the Due Process Clause, and (6) the equitable estoppel doctrine. Although these six defenses to retroactivity are usually raised separately by litigants, they are interrelated. For example, similar elements of proof are needed to establish vested rights and to invoke equitable estoppel. Courts often ask identical questions in determining whether there is a vested right or a due process violation. A Contracts Clause challenge often entails an allegation that the new law has retroactively imposed a new duty; a Takings Clause challenge may arise when a new law imposes a new liability on an existing property interest. A takings lawsuit is more likely to be successful if the property affected by the new law constitutes a vested right. A takings claim and a due process challenge sometimes use the same test—whether the purpose of the retroactive law is justifiable and whether the law will in some way bring about that purpose. Due process and estoppel are linked because each addresses the underlying fairness of the new law.

The interrelated nature of the six traditional legal defenses to secondarily retroactive laws suggests that there may be little difference between them. When viewed functionally, a successful assertion of a particular legal defense to retroactivity depends less on the choice of a specific defense and more on the existence of the following factual variables: (1) a protectable legal interest, often in the form of a property right; (2) an earlier promise by a governmental entity; (3) reasonable reliance on the promise resulting in a legitimate expectation by a private party; (4) some injury to that party; and (5) the absence of a suitable justification or explanation for the governmental decision to proceed retroactively. These factual variables, in effect, have become the functional pre-conditions to

F.2d 324, 329 (9th Cir. 1990) (finding no estoppel against the government absent “pervasive pattern of false promises”).

protected legal status. A critical inquiry for secondarily retroactive legislation is how many of these conditions are present in a given factual context.²⁵⁰

1. Protectable Legal Interest

The initial inquiry for a legal defense to retroactivity is usually whether the private party affected by the retroactivity has some legal interest that existed and was legally protected prior to the new legislation. If such an interest is present, then (1) the Takings and Due Process clauses become applicable if the interest is "private property,"²⁵¹ (2) the Contracts Clause is relevant if the interest is contractual,²⁵² and (3) the vested rights doctrine may be advanced if

250. While not all of these preconditions must be provable to assure protected legal status, the more that can be proven the greater the likelihood that a court will refuse to apply legislation retroactively.

251. For cases involving property interests and the Takings Clause, compare *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-05 (1984) (trade secrets are "property" protectable by the Takings Clause), *United States v. Security Industrial Bank*, 459 U.S. 70, 75-78 (1982) (nonpossessory, nonpurchase-money liens are "property"), *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (mortgages are "property"), *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are "property"), and *Avenal v. United States*, 100 F.3d 933, 936 (Fed. Cir. 1996) (leases are "property"), with *Pittman v. Chicago Board of Education*, 64 F.3d 1098, 1104 (7th Cir. 1995) (no property in job tenure), *Longshore v. United States*, 77 F.3d 440, 443 (Fed. Cir. 1996) (no property in right to participate in federal lottery for a cellular radio license), *Branch v. United States*, 69 F.3d 1571, 1577-78 (Fed. Cir. 1995) (no property in a rule of common law), and *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (no property right to mine in such a way as to endanger public health and safety).

For cases involving property interests and the Due Process Clause, compare *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995) (entitlement to excavation permit from town is "property" subject to due process protection), and *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 714 (6th Cir. 1991) (liquor license is "property"), with *Federal Housing Partners IV v. Cisneros*, 55 F.3d 362, 367-68 (8th Cir. 1995) (no property in rental adjustments), and *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 826 (4th Cir. 1995) (no property in acquisition of special zoning designation).

252. Compare *In re Workers' Compensation Refund W. Nat'l Mut. Ins. Co.*, 46 F.3d 813, 818 (8th Cir. 1995) (stating that a contract exists that is subject to the Contracts Clause when a relationship allocates rights and responsibilities among parties), and *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 384-85 (8th Cir. 1994) (stating that franchise agreements are contracts protected by the Contracts Clause), with *Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982) (stating that a statute cannot impair a contract that did not exist at the time of its enactment), *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (holding that the Contracts Clause only applies to state actions that "impair the obligation of pre-existing

the right has vested.²⁵³ Successful assertion of these defenses protects legal interests from retroactively-applying changes.²⁵⁴

contracts") (emphasis added), *Kestler v. Board of Trustees*, 48 F.3d 800, 803-04 (4th Cir. 1995) (finding no contract before rights vest in a retirement scheme), and *Aves v. Shah*, 914 F. Supp. 443, 447 (D. Kan. 1996) (holding that the Contracts Clause does not apply to a contract that does not precede the challenging legislation).

253. A vested right is a right that has so definitively accrued that it is not subject to defeat by a subsequent legislative act. See *Blue Chip Properties v. Permanent Rent Control Bd. of Santa Monica*, 216 Cal. Rptr. 492, 497 (Cal. Ct. App. 1985); *Caritas Servs.*, 869 P.2d at 41 (something more than a mere expectation). A vested right may be based in specific state constitutional provisions that prevent vested rights from being impaired retroactively, see *People v. D.K.B.*, 843 P.2d 1326, 1334 (Colo. 1993) (en banc) (Kirshbaum, J., concurring), or in the Due Process Clauses, see *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 506-07 (Kan. 1995).

No one has a vested right in the hope that a law will not change, or that private property will be free from subsequent government interference. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (finding no vested interest in any rule of common law); *Smart v. Dane County Bd. of Adjustments*, 501 N.W.2d 782, 787 (Wis. 1993). A vested right must also be something more than a mere unilateral expectation. See *Phillips v. Curiale*, 608 A.2d 895, 901-02 (N.J. 1992); *Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd.*, 903 P.2d 953, 958 (Wash. 1995) (en banc).

254. For cases involving the Takings Clause, see *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (city dedication requirement constitutes a taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1993) (state law preventing building on lots purchased prior to the law's passage is a taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (federal law requiring disclosure of pre-existing trade-secret data may be a taking of the property interest in the data); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (federal law restricting rights to presidential papers is a taking); *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (federal refusal to approve mining plan is a taking); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (order prohibiting construction on wetlands constituted a taking); *Bowles v. United States*, 31 Fed. Cl. 37 (Fed. Cl. 1994) (denial of federal permit a taking); *Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411 (Fed. Cl. 1994) (federal reclamation law prohibiting mining in certain areas is a taking); *Rybacek v. United States*, 23 Cl. Ct. 222 (Cl. Ct. 1991) (Clean Water Act regulations governing discharges from gold placer mining site may be a taking); *Healing v. California Coastal Commission*, 27 Cal. Rptr. 2d 758 (Cal. Ct. App. 1994) (delay in building permit approval may constitute a taking); *Board of County Commissioners of Saguache v. Flickinger*, 687 P.2d 975 (Colo. 1984) (governmental interference that substantially interferes with use and possession of property is a taking); *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (law requiring owners to accept occupation of rental property by persons not already in residence is a taking).

For cases involving the Contracts Clause, see *United States Trust*, 431 U.S. 1 (covenant between New Jersey and New York cannot be repealed in violation of the Contracts Clause); *Educational Employees Credit Union v. Mutual Guaranty Corp.*, 50 F.3d 1432 (8th Cir. 1995) (unconstitutional retroactive alteration of contractual duty regarding capital contributions to credit union); *Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987) (city eviction control legislation violated Contracts Clause); *State v. Leavins*, 599 So. 2d 1326 (Fla. Dist. Ct. App. 1992) (statute outlawing any mechanical dredge for purpose of taking oysters impaired contract

Private parties should be cautioned that not all legal interests are property,²⁵⁵ nor are all property rights (including contract rights) protectable.²⁵⁶ To have a protectable legal interest, especially if such an interest is claimed to be a property interest, the private party must have either a legitimate claim of entitlement to it, or ownership of it.²⁵⁷ To resist a retroactive change in applicable statutory law, a private party will typically claim a pre-enactment property

rights under perpetual oyster harvesting leases); *Ohio Ass'n of County Board of Mental Retardation & Developmental Disabilities v. Public Employees Retirement System*, 585 N.E.2d 597 (Ohio Ct. Common Pleas 1990) (unconstitutional retroactive impairment of retirement contract); *Association of Pennsylvania State College & University Faculties v. State System of Higher Education*, 479 A.2d 962 (Pa. 1984) (retroactive impairment of retirement contract); *Caritas Services, Inc. v. Department of Social & Health Services*, 869 P.2d 28 (Wash. 1994) (en banc) (retroactive amendments impaired contracts between state agency and nursing homes).

For cases involving the Due Process Clause, see *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995) (due process violated when property owner compelled to dedicate land in order to obtain utility service); *Robinson v. City of Seattle*, 830 P.2d 318 (Wash. 1992) (en banc) (ordinance requiring landowners to pay fee or replace rental units before removing or demolishing them violated due process); *Cox v. City of Lynnwood*, 863 P.2d 578 (Wash. Ct. App. 1993) (denial of application of boundary line adjustment violated due process).

255. See, e.g., *Norton v. Village of Corrales*, 103 F.3d 928, 931-32 (10th Cir. 1996) (no property interest in plat approval during time of submission); *Zahra v. Town of Southold*, 48 F.3d 674, 680-81 (2d Cir. 1995) (no protectable property interest in insulation inspection); *Reich v. Beharry*, 883 F.2d 239, 244 (3d Cir. 1989) (not all property interests worthy of procedural due process protection are also protected by substantive due process); *B-West Imports, Inc. v. United States*, 75 F.3d 633, 638 (Fed. Cir. 1996) (interest in import permits not sufficient property right to prohibit government from revoking them without paying just compensation); *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520, 524-26 (Fed. Cir. 1995) (interests held by county as a result of a proffer by a developer to perform certain activities in order to obtain zoning approval were not protectable legal interests).

256. See *Concrete Pipe*, 508 U.S. at 638-41 ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity"); *R. A. Gray & Co.*, 467 U.S. at 733 (retroactive federal economic legislation can affect contracts); *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1125 (7th Cir. 1996) (stating that the Due Process Clause does not prohibit Congress from imposing obligations on employers beyond those voluntarily assumed by contract); *Pro-Eco, Inc. v. Board of Comm'rs of Jay County*, 57 F.3d 505, 508-10 (7th Cir. 1995) (stating that legislation that adversely affects contracts is not necessarily a taking); *Linan-Faye Constr. Co. v. Housing Auth. of Camden*, 49 F.3d 915, 931-32 (3d Cir. 1995) (noting that not every contract gives rise to a protectable property interest).

257. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Mid-American Waste Sys., Inc., v. City of Gary*, 49 F.3d 286, 290 (7th Cir. 1995); *DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 (3d Cir. 1995).

entitlement to a right that was sought (e.g., an approval by a government body of an application)²⁵⁸ or already existed (e.g., a previously granted building permit)²⁵⁹ prior to the legislative change.

2. Government Promises

A government guarantee or assurance may create a legal interest that is protected against secondary retroactive application of a new law. A promise by some government actor about the continued applicability of existing law may prevent the later application of retroactive law. The promise is critical to the success of a vested

258. As a general rule, private parties do not have protectable property interests in government actions if the government has discretion to deny the request. *See, e.g.,* *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 203 (6th Cir. 1995) (no property interest in approval of a permit); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 826 (4th Cir. 1995) (no property interest in an application for a Transfer Zone District classification).

When the discretion of the government body is so narrowly circumscribed that approval of an application is virtually assured, then a party may have a protectable property interest in approval of an application. *See* *Walz v. Town of Smithtown*, 46 F.3d 162, 168-69 (2d Cir. 1995) (finding that homeowners possessed entitlement to excavation permit that constituted property right protected by due process).

259. *See, e.g.,* *United States v. Security Indus. Bank*, 459 U.S. 70, 71, 81 (1982) (holding that a lien perfected before the law was enacted cannot be retroactively taken in the absence of clear congressional intent); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379-80 (11th Cir. 1994) (finding that developer has a vested property interest in a building permit it possessed); *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (presidential papers are protected property, and therefore the Presidential Recordings and Materials Preservation Act may not restrict former President Nixon's rights to his papers); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991) (concluding that developer has a property interest in existing zoning classification after city assured developer that property would not be subject to zoning change and developer engaged in substantial acts in reliance); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (holding that original development approval of a wood-chipping operation granted plaintiff a property interest protected from subsequent rezoning); *Blumberg v. Pinellas County*, 836 F. Supp. 839, 844-45 (M.D. Fla. 1993) (holding that utility customers have property interests in deposits and in the interest generated); *CABO Distrib. Co. v. Brady*, 821 F. Supp. 601 (N.D. Cal. 1992) (holding that distributor had "property interest" in certificate of label approval issued by the Bureau of Alcohol, Tobacco and Firearms, sufficient to enjoin the Bureau's subsequent revocation of the certificate); *S & R Properties v. Maricopa County*, 875 P.2d 150, 157-58 (Ariz. Ct. App. 1993) (holding that a right to a tax refund is a substantive right that vests upon pre-amendment verification of erroneous property tax assessment); *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6, 11-13 (Pa. 1991) (a theater building is protected property that cannot be taken from the owner by a historic preservation law).

rights,²⁶⁰ estoppel,²⁶¹ or Contracts Clause claim.²⁶² The Takings Clause is also more likely to be implicated if what has been

260. To trigger the vested rights doctrine, the government promise must be for a benefit to which the promisee is otherwise entitled. *See Dyce v. Salaried Employees' Pension Plan of Allied Corp.*, 15 F.3d 163, 166 (11th Cir. 1994) (stating that because participants would not otherwise be entitled to benefits, the amendment may be applied retroactively). A unilateral expectation on the part of the party claiming a retroactive impairment of a vested right, such as where the government has discretion to deny or modify the interest affected by the changed law, is not sufficient. *See Triomphe Investors*, 49 F.3d at 203. Nor does a contract necessarily create a protectable promise; a contract with a government entity is only vested when there is some governmental intent to create an enforceable contractual right. *See Mid-American Waste*, 49 F.3d at 289-90. The critical component of a government promise is the extent to which a government entity has in some way encouraged, induced, or approved private action, and thereby promised the private party a right vested against retroactive change. *See Reserve Ltd.*, 17 F.3d at 1381 (vested right in permit after large sums expended in reliance on it); *Resolution Trust Corp. v. Conner*, 871 F. Supp. 1424, 1426-27 (W.D. Okla. 1993) (state statute improperly took away vested right created by common law to assert claims against bank officials for breach of duties); *In re Persky*, 134 B.R. 81, 91-92 (Bankr. E.D.N.Y. 1991) (retroactive application of statutes affecting vested rights is disfavored); *Cline v. City of Boulder*, 450 P.2d 335, 338 (Colo. 1969) (a right is vested when an individual has taken steps in substantial reliance upon an act of a governmental entity); *WMM Properties v. Cobb County*, 339 S.E.2d 252, 255 (Ga. 1986); *Lake Shore Estates, Inc. v. Denville Township Planning Bd.*, 605 A.2d 1106, 1111 (N.J. Super. Ct. App. Div. 1991); *see also Friends of the Law v. King County*, 869 P.2d 1056, 1060 (Wash. 1994) (en banc) (application for plat approval a vested right); *Erickson & Assocs., Inc. v. McLerran*, 849 P.2d 688, 690-92 (Wash. Ct. App. 1993); *Burch v. Monroe*, 834 P.2d 33, 35 (Wash. Ct. App. 1992) (vested right in default judgment which placed lien on property). *But see L.M. Everhart Const., Inc. v. Jefferson County Planning Comm.*, 2 F.3d 48, 52 (4th Cir. 1993) (holding that conditional approval of a subdivision plat does not create vested property right to develop subdivision as approved).

261. Government agencies are subject to estoppel if they have made some promise that an earlier rule will control private conduct. The promise can take the form of representations, assurances, instructions, or even public statements by government officials. *See, e.g., State ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205, 1214 (D. Neb. 1993) (public statements); *Bourne v. Tahoe Reg'l Planning Agency*, 829 F. Supp. 1203, 1209 (D. Nev. 1993) (assurances and representations); *State ex rel. Department of Revenue v. Driggs*, 873 P.2d 1311, 1313 (Ariz. T.C. 1994) (instructions); *Florida Dep't of Transp. v. Dardashti Properties*, 605 So. 2d 120, 123 (Fla. Dist. Ct. App. 1992) (representations); *Hagee v. City of Evanston*, 414 N.E.2d 1184, 1187 (Ill. App. Ct. 1980) (representations).

Some jurisdictions require that the promise must rise to a certain level of culpability, which is most easily demonstrated if the promisor (i.e., the government official) had actual or imputed knowledge of the false nature of the promise, making the representation a misrepresentation. *See, e.g., City of Long Beach v. Mansell*, 476 P.2d 423, 444-45 (Cal. 1970) (in bank); *Miller v. State Employees' Retirement Sys.*, 626 A.2d 679, 682 (Pa. Commw. Ct. 1993).

262. Private parties may be able to resist retroactive changes to contract terms between private parties if the new law's retroactive effect on the contractual promises is not limited in any way (e.g., the law does not contemplate gradual applicability, with grace periods). When a

unconstitutionally affected by a new law is a legal interest arising as a result of some government assurance.²⁶³

3. Reliance

Reasonable reliance on existing law is important for the successful assertion of a (1) takings claim (which may turn on whether the retroactive law interferes with an investment-backed expectation),²⁶⁴

law is not limited, its effect on the promises made by the private parties may be characterized as a "sudden, totally unanticipated, and substantial retroactive obligation." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978). A new law which is "substantially retroactive" is one which impairs existing contracts immediately upon its effective date, and which provides no relief to the parties whose contractual right have been abridged in the future. *See First Nat'l Bank of Pennsylvania v. Flanagan*, 528 A.2d 134, 137-38 (Pa. 1987).

An impairment might also be substantial if application of the new law works a change in the remedies under a contract, thereby converting an otherwise enforceable agreement into a "mere promise," and impairing the contract's obligatory force. *See Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 316-17 (1843); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197-98 (1819). Some jurisdictions presume a substantial impairment if retroactive application of the new law adds a new and unforeseen obligation or duty to the parties' promises in a contract. *See, e.g., Dale Baker Oldsmobile, Inc. v. Fiat Motors of N. Am.*, 794 F.2d 213, 215-16 (6th Cir. 1984); *Karl v. Bryant Air Conditioning Co.*, 331 N.W.2d 456, 463 (Mich. 1982). If the impairment is substantial, protected legal status will not be denied simply because a state is exercising its otherwise legitimate police powers. *See, e.g., Educational Employees Credit Union v. Mutual Guar. Corp.*, 50 F.3d 1432, 1438 (8th Cir. 1995).

263. When the government retroactively denies a property owner the benefits of official promises, there may be a taking. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (promise of confidentiality); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988) (zoning resolution approving development); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B. Dec. 1981) (building permit).

A court may also find a taking if a retroactive law has interfered with "distinct investment-backed expectations." *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Golden Gate Hotel Ass'n v. City of San Francisco*, 864 F. Supp. 917, 926-27 (N.D. Cal. 1993). An owner of property not only has a protectable expectation, but one which is considered "distinct," if the government has explicitly promised that it will not be retroactively impaired by subsequent law. *See Ruckelshaus*, 467 U.S. at 1011 (federal government explicitly guaranteed an extensive measure of confidentiality and exclusive use of trade secret data).

264. A legally protected expectation exists when a property owner can show that a private decision about the property occurred in the past, in reliance on a state of affairs that did not include the possibility of a new, retroactively-applied law. When it is not reasonably foreseeable that there might be a change in the law, then there is an expectation protected by the Takings Clause against retroactive interference. *See Creppel v. United States*, 41 F.3d 627, 633-34 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177-78 (Fed. Cir. 1994); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436 (Fed. Cir. 1990); *Bowles v. United States*, 31 Fed. Cl. 37, 50-52 (Fed. Cl. 1994); *NRG Co. v. United States*, 24 Cl. Ct. 51,

(2) due process claim (which considers the fairness of changing the rules on someone who has relied on a previous set of rules),²⁶⁵ or (3) Contracts Clause claim (which assumes that parties to a contract rely on the fact that the terms of the contract will not change).²⁶⁶ Detrimental reliance often is influential in determining whether an expectation thwarted by a retroactive law rises to the level of a protected vested right.²⁶⁷ If a party did not assume the risk of a future change of law, and if the possibility of change was unforeseeable, it may be impermissible for a new duty or an unexpected liability to affect reliance interests.²⁶⁸ Also, one of the traditional elements of equitable estoppel is reliance.²⁶⁹

62 (Cl. Ct. 1991).

265. When a private party has reasonably relied on past assurances by a government body that the applicable law will not be changed in the future to adversely affect past private actions, due process can prevent a new law from applying to the party. *See* *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994).

266. A Contracts Clause violation is more likely when legislation thwarts the contracting parties' reasonable reliance on the terms of an existing contract. *See Spannaus*, 438 U.S. at 242-44, 246; *United States Trust*, 431 U.S. at 20-21 n.17, 25; *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322-23 (8th Cir. 1991); *Williams v. Old Am. Ins. Co.*, 882 P.2d 576 (Okla. Ct. App. 1994). If retroactive legislation addresses a topic never before reached by regulation, then reliance interests are legitimate and parties may successfully raise the Contracts Clause. *See West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 734-35 (D.C. 1994).

267. *See Evans v. Board of County Comm'rs of the County of Boulder*, 772 F. Supp. 1178, 1180 (D. Colo. 1991); *Heikes v. Heikes*, 899 P.2d 1349, 1356-57 (Cal. 1995); *Pioneer Trust & Sav. Bank v. County of Cook*, 377 N.E.2d 21, 26 (Ill. 1978); *County of Kendall v. Aurora Nat'l Bank Trust No. 1107*, 579 N.E.2d 1283, 1289 (Ill. App. Ct. 1991); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390, 397 (Neb. 1994).

In determining whether a law may apply retroactively, it is often better not to focus on whether the right held is "vested," but rather, on whether the law surprises persons who have long relied on a contrary state of the law. If there has been such reliance, the term "vested right" may be only a shorthand description of a judicial determination that a law-making body should not retroactively alter past private action. *See* Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 N.W. U. L. REV. 540, 561 (1956). *See also* *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6, 16-17 (Colo. 1993) (en banc); *Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n*, 384 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1976); *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 870 (R.I. 1987); *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 615 S.W.2d 947, 956-57 (Tex. Civ. App. 1981).

268. Some jurisdictions are reluctant to apply statutes retroactively when the new duty or liability would significantly impair existing substantive rights, and disappoint legitimate reliance interests. *See McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 15 (1st Cir. 1993). In other jurisdictions it is thought to be either unconstitutional or illegal to impose

4. Harm

An estoppel action requires reliance that produces some detriment or injury.²⁷⁰ Protected legal status usually requires a party affected by

unexpected future obligations or penalties on past occurrences. *See Lieberman-Sack v. Harvard Community Health Plan of New England, Inc.*, 882 F. Supp. 249, 255-56 (D.R.I. 1995); *Colorado Office of Consumer Counsel v. Public Serv. Co. of Colorado*, 877 P.2d 867, 870 (Colo. 1994) (cannot retroactively raise rates paid by ratepayers); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *OSI Indus. v. Utah State Tax Comm'n*, 860 P.2d 381, 383 (Utah Ct. App. 1993) (a later statute or amendment should not be applied retroactively to impose a greater liability on a private party); *see also Louisiana-Pacific Corp. v. Asarco, Inc.*, 24 F.3d 1565, 1577-78 (9th Cir. 1994) (new private cause of action which imposes liability on private parties should not be retroactive); *Rodriguez v. General Motors Corp.*, 27 F.3d 396, 398-99 (9th Cir. 1994) (same).

Conversely, when property owners are on constructive notice that new obligations may be imposed by Congress, there is no constitutional impediment to such retroactive legislation. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986); *Student Loan Mktg. Ass'n v. Riley*, 907 F. Supp. 464, 470 (D.D.C. 1995).

269. *See Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59-60 (1984) (estoppel against the government may be asserted when there is official affirmative misconduct, upon which a private party has detrimentally relied); *Dion v. Secretary of Health & Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987) (a private party "should not suffer for an agency's delays and errors"); *Decarion v. Monroe County*, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994) (state estopped from depriving property owner of building permit); *Hy Kom Dev. Co. v. Manatee County*, 837 F. Supp. 1182 (M.D. Fla. 1993) (county estopped from declaring permit invalid after developer had obtained the permit and expended \$2.5 million in reliance on it); *State ex rel. Department of Revenue v. Driggs*, 873 P.2d 1311 (Ariz. T.C. 1994) (state estopped from collecting additional tax assessment when state forms were incorrect); *see also Jafay v. Board of County Comm'rs of Boulder County*, 848 P.2d 892, 903 (Colo. 1993); *Jazzetti v. Village of Tuxedo Park*, 546 N.Y.S.2d 295, 298 (N.Y. Sup. Ct. 1989); *Department of Commerce v. Casey*, 624 A.2d 247, 253-54 (Pa. Commw. Ct. 1993); *State ex rel. Wyoming Workers Compensation Div. v. Rivera*, 796 P.2d 447, 450 (Wyo. 1990).

For purposes of equitable estoppel, an act of reliance typically entails the expenditures of money or the incurrence of an obligation. *See, e.g., Equity Resources, Inc. v. County of Leon*, 643 So. 2d 1112, 1118 (Fla. Dist. Ct. App. 1994); *Hagee v. City of Evanston*, 414 N.E.2d 1184, 1187 (Ill. App. Ct. 1980); *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs of Santa Fe County*, 551 P.2d 1360, 1366-67 (N.M. 1976). Reliance is reasonable and in good faith if there was no convenient way for the private party to ascertain that the government representation was unreliable or false. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1550 (11th Cir. 1994); *City of Long Beach v. Mansell*, 476 P.2d 423, 42-44 (Cal. 1970) (in bank).

270. A condition to a successful equitable estoppel action is injury resulting from a government representation or promise. This condition is met when the private party has made such a substantial change in position, incurred such extensive obligations, or made such significant expenditures that it would be unfair to retroactively alter or destroy the benefits acquired under the earlier promise. *See Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994); *Simons v. City of Portland*, 887 P.2d 824, 831 (Or. Ct. App. 1994);

secondary retroactivity to demonstrate some harm or injury resulting from the new law. Both vested rights and contracts are presumptively protected if they are "impaired."²⁷¹ There may be an unconstitutional taking if a property right has been physically invaded,²⁷² singled out for restrictive regulation,²⁷³ or subject to the loss of economically

Kramarevsky v. Department of Soc. Servs., 863 P.2d 535, 549-51 (Wash. 1993) (en banc) (Madsen, J., dissenting).

271. If one has a vested right, a new law which is secondarily retroactive may not be applied so as to impair the right or deprive the holder of it. *See Estate of Ridenour v. Commissioner*, 36 F.3d 332, 335 (4th Cir. 1994); *Pardee Constr. Co. v. California Coastal Comm'n*, 157 Cal. Rptr. 184, 189 (Cal. Ct. App. 1979) (amendment would destroy vested rights); *Griffin v. City of N. Chicago*, 445 N.E.2d 827, 830 (Ill. App. Ct. 1983); *Saint Vincent Hosp. v. Blue Cross & Blue Shield of Montana*, 862 P.2d 6, 9 (Mont. 1993) (finding that statute would impair vested rights).

The text of the Contracts Clause in Article I, Section 10 provides that the Clause's protection is triggered when a contract is "impaired." A contract is impaired by a statute which alters its terms, imposes new conditions, or lessens its value. *See Federated Am. Ins. Co. v. Marquardt*, 741 P.2d 18, 23-24 (Wash. 1987).

The Supreme Court has established that a "threshold inquiry is 'whether the state law has . . . operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quoting *Spannaus*, 438 U.S. at 244). *See also United States Trust*, 431 U.S. at 17. The severity of the impairment increases the level of scrutiny to which retroactive legislation is subjected. *See Spannaus*, 438 U.S. at 245. Substantial impairment occurs when legitimate reliance interests and expectations are defeated by the new law. *See Association of Surrogates v. New York*, 940 F.2d 766, 772 (2d Cir. 1991); *Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990); *Haley v. Pataki*, 883 F. Supp. 816, 825 (N.D.N.Y. 1995); *Arriaga v. Members of the Bd. of Regents*, 825 F. Supp. 1, 6 (D. Mass. 1992); *Opinion of the Justices (Furlough)*, 609 A.2d 1204, 1210 (N.H. 1992) (per curiam); *Peppers v. Beier*, 599 N.E.2d 793, 795 (Ohio Ct. App. 1991).

272. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982); *Panhandle E. Pipe Line Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1311 (S.D. Ind. 1995); *GTE Northwest, Inc. v. Public Utility Comm'n*, 900 P.2d 495, 503 (Or. 1995) (in bank); *Hoover v. Pierce County*, 903 P.2d 464, 469 (Wash. Ct. App. 1995).

273. *See, e.g., Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987); *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1274-75 (8th Cir. 1994); *Blumberg v. Pinellas County*, 836 F. Supp. 839, 845-46 (M.D. Fla. 1993); *Aspen-Tarpon Springs Ltd. Partnership v. Stuart*, 635 So. 2d 61, 68 (Fla. Dist. Ct. App. 1994); *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 394 (N.Y. 1994); *see also Norwood v. Baker*, 172 U.S. 269, 278-79 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking . . .").

This judicial aversion to retroactive laws which have "singled out" particular property owners also extends to government actions that deny only one owner use of its property in order to capitulate to the unreasonable fears of the surrounding community. *See Cardon Oil Co. v.*

viable use.²⁷⁴ A successful due process challenge often entails an allegation that the effect of the new law is "oppressive."²⁷⁵

5. Rationality

Finally, a retroactive law is constitutionally suspect if it fails to meet the test of essential rationality. This test is simply a requirement that the new law have a valid purpose, and that the choice to apply its terms retroactively be consistent with this purpose. A retroactive law that impairs a contract may be void under the Contracts Clause if it is

City of Phoenix, 593 P.2d 656, 659 (Ariz. 1979); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408 (Neb. 1994).

274. One common consequence of secondary retroactivity is a reduction of the economic value of existing property affected by the new law. The Supreme Court has confirmed that there may be a taking of property (giving property protected legal status under the Takings Clause) after a reviewing court considers (1) the "economic impact of the [new] regulation," *Penn Central*, 438 U.S. at 124, and (2) the new law's likelihood of denying the owner "economically viable use of this land," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There may be no predictable difference between an adverse economic impact and a denial of economically viable use. What is certain is that there is a categorical taking (and protected legal status) when the new law has the effect of depriving the owner of all future worth, value, or economically beneficial use of property not otherwise characterized as a nuisance under state law. See *Lucas*, 505 U.S. at 1015-16; *New Port Largo, Inc. v. Monroe County*, 856 F. Supp. 659, 662 (S.D. Fla. 1994); *Healing v. California Coastal Comm'n*, 27 Cal. Rptr. 2d 758, 768 (Cal. Ct. App. 1994); *Peterman v. Department of Natural Resources*, 521 N.W.2d 499, 506-07 (Mich. 1994).

Even in the absence of a total taking, it may be unconstitutional for a retroactive law to deny the owner the right to economically exploit the land—to sell it for the best price available in the market. See *Brown v. United States*, 73 F.3d 1100, 1104 (Fed. Cir. 1996); *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994).

275. See *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Priddy v. City of Tulsa*, 882 P.2d 81, 84 (Okla. Crim. App. 1994); *Rivett v. City of Tacoma*, 870 P.2d 299, 303 (Wash. 1994) (en banc). Laws tend to be characterized as oppressive or burdensome if their retroactive application will deprive a person of (1) a legal interest, such as a vested right, (2) an entitlement to a particular government action, or (3) a private property interest which is specially protected by the Due Process Clause. See *Walz v. Town of Smithtown*, 46 F.3d 162, 168-69 (2d Cir. 1995) (state-created property right); *National Union Fire Ins. v. City Sav.*, F.S.B., 28 F.3d 376, 394 (3d Cir. 1994) (right to raise defenses and affirmative defenses); *HBP Assocs. v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995) (property interest in a government service); *Garcia v. La Farge*, 893 P.2d 428, 437 (N.M. 1995) (imposition of an unreasonably short statute of limitations period); *Schimmer v. Homestake Mining Co.*, 882 P.2d 11, 14 (N.M. 1994); *Caritas Servs.*, 869 P.2d at 41 (vested right). The rationale behind this component of due process is that movement should respect certain settled expectations, and that holders of vested or protectable property rights should be secure against governmental disruption.

not justified by a legitimate state interest.²⁷⁶ If a retroactive law does not substantially advance a legitimate state interest it may constitute a taking.²⁷⁷ A retroactive law may also violate due process if it is arbitrary,²⁷⁸ or if it cannot accomplish the government's goal.²⁷⁹

276. A retroactive law that impairs private contracts is void under the Contracts Clause if it is not justified by a significant and legitimate public purpose, such as the remedying of a general social or economic problem. If the State is unable to articulate an urgent social need for the new law, or if its intent is to create a windfall for one private group at the expense of another, or if it retroactively redistributes assets to benefit only a selected few, then the private contract affected by the new law is more likely to have protected legal status. *See In re Workers' Compensation Refund W. Nat'l Mut. Ins. Co.*, 46 F.3d 813, 818-19 (8th Cir. 1995) (stating that goal illegitimate if achieved by retroactive means); *Earthworks Contracting, Ltd. v. Mendel-Allison Constr. of California, Inc.*, 804 P.2d 831, 837-38 (Ariz. Ct. App. 1990).

Similarly, if the impairment is not reasonably necessary to solve some general societal problems, but is instead designed to promote a more profitable private use of property, there may be a Contracts Clause violation. *See Pulos v. James*, 302 N.E.2d 768, 774-75 (Ind. 1973); *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 464-65 (Ind. Ct. App. 1987).

277. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818, 827-29 (W.D. Pa. 1995).

Courts are suspicious of laws that burden an owner's existing property rights with the purpose of pressing the private property into some kind of public service. The troublesome fact is that private property is being singled out for a burden and the beneficiaries of the burden are persons not otherwise sharing in the burden. Such retroactive laws unfairly distribute the practical negative consequences of a new law by producing a future effect which is experienced disproportionately by targeted property owners. This kind of law does not further a legitimate state interest (and is a taking) when the affected property owners have been "force[d] alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994).

278. A retroactive law is "arbitrary" if there is absolutely no evidence to justify imposition of a new rule, or no reason whatsoever for the decision to proceed retroactively. *See United States v. Carmack*, 329 U.S. 230, 243 & n.14 (1946) (stating that an arbitrary decision is one "without adequate determining principle or [is] unreasoned"); *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir. 1986) (stating that a law is arbitrary if "the government could have no legitimate reason for its decision"); *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (stating that a law is arbitrary when government acts with indefensible reason); *Adamson Cos. v. City of Malibu*, 854 F. Supp. 1476, 1491 (C.D. Cal. 1994) (finding a law arbitrary when no evidence to justify law); *Hixon v. Walker County*, 468 S.E.2d 744 (Ga. 1996) (stating that a law is arbitrary if no standards guide discretion).

279. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692-94 (3d Cir. 1993); *National Educ. Ass'n—Rhode Island v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 890 F. Supp. 1143, 1165 (D.R.I. 1995); *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 625-26 (Fla. 1990); *Upper Deerfield Township v. Seabrook Hous. Corp.*, 605 A.2d 1160, 1163 (N.J. Super. Ct. Law Div. 1991); *Cox v. City of Lynnwood*, 863 P.2d 578, 583 (Wash. Ct. App. 1993).

CONCLUSION

Courts, legislatures, administrative agencies, and other lawmakers must change applicable law from time to time. A change may be thought necessary because of differing social and economic contexts, a rethinking of the continued usefulness or fairness of the old law, or a realization that the old law had caused unanticipated negative consequences. Whatever the reason for the change, one central issue inevitably associated with the change is whether it should apply to or otherwise affect persons whose pre-change conduct has been influenced by the old law, or whether it should apply only to conduct arising after the change. This is the problem of retroactivity.

Analysis of the problem begins with an understanding of the important difference between primary and secondary retroactivity. When a legislature enacts a substantive statute which is an example of true secondary retroactivity, three questions follow:

- (1) Has the legislature intended the statute to apply retroactively?
- (2) If not, should the statute be presumed to apply retroactively?
- (3) Regardless of legislative wishes, may the statute apply retroactively?

The third issue is often resolved by determining whether the private actions subject to the new statute have achieved protected legal status.

The study of retroactivity has been neglected too long. The Supreme Court has focused considerable attention on the topic,²⁸⁰ and in so doing has raised the possibility that private property owners adversely affected by new law may raise defenses of impermissible retroactivity to prevent application of the new law. Retroactivity is an alternative way of thinking about how laws may harm private expectations and individual action taken in good faith reliance on a

On the other hand, the requirements of due process are satisfied if retroactive application of new legislation is rationally related to a legitimate government purpose. *See R. A. Gray & Co.*, 467 U.S. at 729-30; *Usery*, 428 U.S. at 15-18; *Hamama v. INS*, 78 F.3d 233, 236 (6th Cir. 1996).

280. *See supra* notes 1-3 and accompanying text.

continuation of previous law. For parties accustomed to losing takings or due process challenges to government action, an argument concentrating on the essential unfairness of the action's retroactivity may be more effective in protecting private interests otherwise injured by changes in law.

